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IN MEMORY OF

JUDGE DOUGLASS BOARDMAN

FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

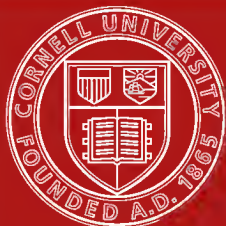
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Decisions in the High Court of Admiralty



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DECISIONS

IN THE

HIGH COURT OF ADMIRALTY,

DURING THE TIME OF

SIR GEORGE HAY,

AND OF

SIR JAMES MARRIOTT,

LATE JUDGES OF THAT COURT.

EDITED BY GEORGE MINOT,

COUNSELLOR AT LAW.

VOLUME I.

MICHAELMAS TERM, 1776, TO HILARY TERM, 1779.

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PREFACE.

It has been long complained that there are no public reports of decisions in the Court of Admiralty, or Ecclesiastical and Testamentary Courts among the civilians. Their jealousy of the common lawyers, and a concealment of what passes among the little knot of practitioners, seem to have occasioned that respectable and learned profession to be compared to the Talmudists among the Jews, who only dealt in oral traditions or secret writings. No persons were allowed to be professed practical conjurers but the Sanhedrim themselves. That complaint is now in part removed, and, as it is announced, will continue to be removing by a publication of Reports of Cases argued and determined in the High Court of Admiralty, commencing with the judgments of the Right Honorable Sir William Scott, Michaelmas term, 1798. Those reports may tend, with former precedents, to convince the world that the government of Great Britain has done and does justice, in the fullest and most open manner, to neutrals in war, as well as to its own subjects. It is to be hoped that, now the veil of the temple is drawn back, some advocate, equally accurate with Dr. Robinson, will publish reports of cases adjudged in the Ecclesiastical and Testamentary Courts, and under judicial approbation and sanction. Severe remarks to their prejudice have fallen from persons who know little of those courts.

The printing these decisions of the High Court of Admiralty, beginning Michaelmas, 1776, previous to those of Sir William Scott, was at the desire and expense of government; and if they are shorter and less in a popular style than those lately published, they had the same motive. No motive but one purely national occasioned these former decisions to have been ever committed to the press. The justification of the conduct and character of the British government upon public and avowed principles, so as to gain that most powerful weight in the machine of human affairs, universal confidence, was the great object; to prevent, if possible, the ideas of neutral powers, founded on their own arbitrary modes of proceeding, from harassing the British ministers personally with unreasonable complaints, and with demands upon them of doing that which was impossible in a

limited government, as it was unreasonable to do; and otherwise, from forming those coalitions which, long foreseen, have now taken place, so as to render by such coalitions, if possible, the naval power of Great Britain of little consequence; from giving the utmost assistance to a frequently defeated enemy, under the pretence of neutrality, and of protected carriers of the weakest belligerent, and from prolonging the war. If this could be permitted, it is to no purpose that the maritime commerce, wealth, and power of France seem almost annihilated, if, at the very moment of perishing, it shall be permitted to revive.

A British minister, of very high authority abroad in the last war, expressed himself in the most pointed language, in one of his letters, that a judge of the High Court of Admiralty of Great Britain must wipe away a notion which foreigners had adopted, that the court was composed of several men, that the judgments were according to the common law of England, that the court was but the little finger of the first Lord Commissioner of the Admiralty, or rather of the efficient minister, and that the judge himself was removable at his nod; but that the idea, on the contrary, should be impressed upon foreign governments, that a British judge of the admiralty was independent, in a certain degree, as much as the other judges of England by the Bill of Rights, and amenable only, like them, to parliament; that he must have a spirit of doing equal justice, "*Tros Rutulusve*," as if he were the chosen umpire of every maritime country of the universe, in the first instance of a litigated cause, appealable only to the superior tribunal of state. The words of the sentence are singular in the style of this court, "Thrice calling upon the name of Christ, and having the fear of God alone before his eyes, the judge pronounces and decrees." This shows the original idea, that he might be a man of too pliant and practicable stuff; that he ought to be a man not actuated by personal views of ambition and avarice, and courting by a mean adulation, for the purposes of the day, the smiles of a superior, or the popularity of any set of men of any sort of profession. He should be without narrowness of mind, or meanness of education. In short, a judge ought to be a man intrepid. It has been suggested that the powers of a judge of the High Court of Admiralty were too great to be intrusted to any one man; but is it true that those powers are unconstitutional or unnecessary? Have they ever been abused? Are they unlimited? Let all this be first proved. For the answer to one question, we may refer to the decisions down to the period preceding the present administration of the national justice. To the second question, the jurisdiction *in primo limine* is limited by an appeal to the king and council. The lord chancellor of Great

Britain is limited by appeal to the House of Lords, although it finds him there as speaker. The lord chief justices are limited by writ of error to the same august tribunal. The powers vested in the sovereign, and in his minister, the delegate of authority, however great these powers are, they are constitutional; and, what is more, they are necessary. But putting all these powers into commission, and introducing republican despotism and summary proceedings, must destroy all confidence, both in British subjects and in foreign. If it could be supposed for a moment that justice were weighed in two different balances, of personal interest and impartiality of judgment; that foreigners should even become judges of their own causes of prize; that justice should have only one eye in one place, but two or more in another; in a word, if this were so, the having a boot or a log for a judge would have answered best the interest and views of certain persons. What sort of men judges upon any benches have been, is best seen in British history. The faithful records of time when mankind became more civilized, enlightened, and free, will transmit their names to a disinterested and discerning posterity. Sir Julius Cæsar, in the reign of Queen Elizabeth, Sir Henry Vane, in that of Charles I., Sir Leoline Jenkins, who was also secretary of state, Sir Thomas and Dr. Exton, judges in that of Charles II. and Sir Charles Hedges, secretary of state in the reigns of William and Queen Anne, all stand forth as prominent characters to an impartial public. If any opinions rather leaned to answer the purpose of the moment, it is not to be wondered that any person possessed of the exercise of royal power wished to draw them to his own will and pleasure, and to have the sole and immediate direction of those scales in which right and wrong were to be weighed, and concerning which he ought to have been instructed, rather than peremptorily to dictate. The characters of James, Duke of York, Lord High Admiral, and of the king his brother, Charles II., need no comment. As to their successors, those judges whom we have known, or know personally, nothing need be said. The latest decisions in the first instance have found their way, through the medium of the press, to the world. What will be the definitive determination, rests with the Lords Commissioners of Appeals in the privy council.

In the war before last, the neutral agents in causes of prize, desirous, as it was natural, to enhance the merit of their own services, and every man to have his own activity, diligence, and sagacity taken notice of in preference to other agents, wrote to their correspondents abroad that nothing could exceed the expensiveness and delays of the High Court of Admiralty; that no redress was to be obtained from the justice of that court, nor equity of the British government, but

by force, or making all affairs of capture the subject of ministerial intervention and complaint, as between sovereigns.

The practice was then (not so indulgent as since) to pronounce almost universally for just cause of seizure and expenses, and for further pleading and proof on the part of the claimant. At all events, the capture was a prize to practitioners. Neutrals were, if not driven to compromise, harassed, and the minds of men in the mercantile, as well as the political world, were inflamed. Pleadings were introduced against pleadings; expensive commissions were sent abroad to examine witnesses; and the simplicity of the process of a Court of Admiralty, which, particularly in causes of prize, ought to be as summary as possible, and, as the style is, *velo levato*, (with full sail hoisted,) was changed to the resemblance of the long-tailed and incumbered proceedings of a court of chancery. France, distressed, found it her interest, instead of enforcing her own rigid ordonnances, to fling the carrying trade of all her domestic and colonial produce into the hands of neutrals, and particularly of the Dutch, which nation had by treaty the especial privilege of free ship, free goods, but which France now encouraged all the Northern maritime nations to arrogate to themselves as a matter of common right, as by a new law of nations; and that although each nation was bound by its own particular treaties, yet the sea ought to be considered as free an element as the air, and every man's ship as his own castle, and the national flag and pass as sufficient to protect a ship and cargo from being stopped, and particularly from being searched and brought in for adjudication. The British cruisers covered the ocean: the instructions of the British government were peremptory, and scarcely a neutral ship left a neutral or enemy's port without having the property of French subjects on board openly or covered. The activity of cruisers made them bold in a predatory war: merchants of all nations interested directly or indirectly, were loud in their clamors to the ministers of their respective countries; all were animated with the desire of making themselves of consequence, or gaining some profit. The doctrine of "free ship, free goods," and treaties, were ill understood or overlooked. "Free ship, free goods," is a short pithy sentence; but the application is from misapprehension of the sense, or from taking for granted that the proposition is true universally; for all neutral ships are not free by the law and usage of nations, but only those that are privileged specifically by treaties; and nations, although pretending to be non-belligerents, must make themselves actual parties in war when they assist one of the belligerents. It can never be so much for their interest as to be simple carriers. What would be the fate of neutral wagons attempting to go

through the lines and posts of a belligerent power? The British government was alarmed with a fear that all the northern maritime powers would form a confederacy, and enforce a free commerce, which would render a naval war and ascendancy of the fleets and armaments of Great Britain not only of no avail, but even give a preponderancy to those of France. Our own merchants, particularly the insurers, felt with the enemies of England. The question was actually debated in the committee of the States General of Holland, whether they should not declare war against England. The forwardest of the foreign courts upon this occasion was that of Prussia, scarcely with a ship or a port, its flag was to be held up to protect the world.

The Elector of Brandenburg had a personal dislike to the Elector of Hanover and King of England. A low man, with as low establishment, was sent hither in a diplomatic character, to show contempt, to affront, and complain. The common lawyers of England, who are the great counsellors of its government, but who knew little of the Admiralty Court and the law of nations, arrogated all power and knowledge to themselves, but were, when called upon, unable to answer the memorial of the Prussian minister, Mons. Michel. To Sir George Lee, the archbishop's judge of the Prerogative Court, and Dr. Paul, the advocate-general of the king, two eminent civilians; were added two great common lawyers, the attorney-general, Sir Dudley Ryder, and the solicitor-general, Mr. Murray: who all of them drew up an answer and signed it. The latter, from the place of his birth, had a predilection for the imperial or civil law, which he quoted on many occasions, and piqued himself upon a superior knowledge. He took to himself the principal merit of this performance, which was ushered into the world with great eclat, and by high authority.

Notwithstanding all this, there is reason to believe, that the King of Prussia having threatened to invade Hanover, the whole matter was put to sleep by our government privately restoring the value of the ships and cargoes, protected, as it was insisted, by the Prussian flag, although the property of enemies of England.

The pertinacity of the King of Prussia was unfortunately increased by Lord Grenville, favorite of King George II., and the great adviser of his councils, having used a lively expression, "that he never heard of the flag of Berlin before, and should as soon have expected to have heard of the flag of Frankfort."

The same notions of "free ship, free goods," were again revived in the last war by the late Empress of Russia, not understanding them, and putting herself at the head of what was called the armed neutrality. One Carlo Bereens, a Livonian, merchant, lawyer, and politician, in a furious memorial, informed the empress that he and others of her subjects were greatly obstructed in their commerce by the English cruisers; that England could not command a ball of packthread without her, and that she had nothing to do but to speak the word. The immense profit of the balance of trade between Great Britain and Russia was never stated or considered. To her resentment, expressed too hastily on this occasion, the British government thought proper to submit, and a quantity of sail-cloth, sufficient to have fitted out the whole Spanish fleet from Ferrol and Cadiz, was restored upon reversal of the decree of condemnation in consequence of an appeal, and the captor absolutely condemned in costs and damages. But the effect of the sentence in the first instance was the stopping the Spanish fleet. The idea of government was, that this great lady must not be put out of humor, and that in granting so much to the Russian flag for the moment, there was nothing very material granted in fact, because it was notorious that the Russians have but few merchant or carrier ships of their own, perhaps not half a dozen; and that the true doctrine of the law of nations is, that the ship confers the privilege on the flag, and not the flag upon the ship; and lastly with respect to the armed neutrality, Denmark, Sweden, &c., must be judged in cases of capture by their own separate and several treaties, as well as they would be guided by their own particular interests.

It is no matter of surprise that the lowest of mankind who arrogated a name, too honorable for themselves, that of merchants, men who are the refugees of every country, bankrupts in property and reputation, and even traitors to the very government under which they were born, and have been and are protected, should be the low instruments of faction and hostile intrigues against it, wishing to advance themselves in wealth or consequence. It is no matter of surprise that men of very narrow ideas, such as masters and owners of ships, accustomed to *mesquinerie*, and the feelings only of little profits and losses, should see so little of their own greater interests, but that enlightened persons of education and reflection, sagacity and high rank in the cabinets of sovereign princes, whom they advise and direct, should not discover the attempts of little busy intriguers to blind and seduce them, by giving way to false representations, and run counter to the most solid interests of the sove-

reigns whom they advise, and of the nations whom they guide, is astonishing. Sir Joseph Yorke, in one of his letters, calls the envoys of certain foreign states not ministers, but a harder name, humbly and ill-paid by their own government; better by the enemy as licensed spies: and their despatches home filled with articles taken from the newspapers of faction. If ever a fact were well known and established, it is, that the purchase of naval stores by the British government, the restitution of the ships, the payment of freights to the place of destination, and all reasonable demurrage allowed, was a most beneficial thing for neutral carriers. No credit being given by neutrals to the French government, for all cargoes laden on its account were paid for previously to lading or sailing, the carriers then sold these same cargoes to the British government upon capture and detention, and thus in fact derived the immense profit of cent. per cent. double freights, short trips instead of long voyages, &c. &c. Notwithstanding all this, a privilege most systematical and problematical is now to be supported by blood; all these profits are to be put an end to, and the theory of French politics and philosophical liberty of the seas to be announced and supported. What a delirium must have seized those persons who govern the world! The masters and owners of ships almost in every neutral port, according to the letters of Sir Joseph Yorke, were perfectly satisfied, and even delighted. Nothing more could be asked or desired, and nobody was discontented but the navy board for their contracts and contractors, the treasury felt for a very wise and political, but great expenditure, and the enemies of Great Britain were the sufferers.

It should not be expected that the commissioners of the navy board should be men of long and correct views; their ideas were the narrow ones of profit and loss of the immediate moment. They accordingly addressed themselves not to their proper principals, the Board of Admiralty, of which they are but a subordinate and dependent branch, but to the secretary of state for foreign affairs, by two letters, one dated 29th September, 1779, the other on the 28th of October following. The commissioners proposed, "as a method to avoid the expense of the long demurrage of neutral ships laden with naval stores, which upon examination they said they had found of too inferior a quality to be employed for the use of his Majesty's navy, and neither useful to us or the enemy; that the demurrage is a ground for complaint of neutral subjects and a great increase of public expense;" and (that the expense might lose nothing in figure) they observed, "that according to the discount of navy bills for some time past, this expense was equal to 240,000*l*. That the valuation made by their officers amounted to no more than 135,000*l*.; and they proposed that they should be

furnished with specifications of the cargoes of all neutral store-ships, before the Court of Admiralty takes any notice of them, and that they may have an option to purchase according to circumstances." The answer to this attempt of the navy board setting themselves up for independence was very obvious.

That the assuming the jurisdiction *in primo limine* of the High Court of Admiralty was unconstitutional; contrary to the instructions of his Majesty to his cruisers, who were to bring in all their prizes and proceed regularly; that freights, demurrage, and costs were to be settled by two eminent unobjectionable merchants, named by the judge, and in the presence of his registrar; that every difficulty was proposed to be flung upon the king's ministers, the captors and the claimants, the latter of whom had pledged to them the royal word by the declaration of the Earl of Suffolk of the 19th October, 1778, that in all cases of stores *bonâ fide* laden before the notification of the war, and no prevarication or frauds of either oral or instrumental evidence, reasonable demurrage was to be allowed.

If the navy board and their officers were to have their option to purchase or reject any sort of naval stores, let it be asked, who were to have paid the expenses of seizure, detention, and demurrage, or was the innocent neutral to take away ship and goods at an immoderate loss? Not a rope, a spar, or a board but was useful, contrary to the untrue suggestion of the navy board to either his Majesty, to this nation, or its enemies. It is well known who and what British merchants had contracts for naval stores at Petersburg, and other ports in the Baltic, for the French arsenals and government; and if at last neutral foreigners were induced to yield to the temptation of England and France out-bidding each other, and brought smaller naval stores in the way of British cruisers, it was no policy to reject them, under the invidious name of rubbish. A great man, so purblind as to read every paper with pain, found it easier to make a blustering speech or raise a laugh by a joke than to take trouble to be informed of the necessities of a nation which he had then plunged into a war, which has changed and is likely to change more and more every day the face of the universe by its consequences. "If neutrals were to import punch and his puppet show, were they to be bought?" "Yes; and nobody so proper to show the puppets as himself," was the answer. This island was to be the depot of all the naval produce of the north; he was ashamed. The navy board was repelled; and all the honest neutrals highly gratified. Our high allies, the masters and owners of ships and cargoes, were to be subsidized by the most ample justice being done to them; the credit and integrity of this

country was to be raised to the utmost pitch of honor, and our restless enemies both at home and abroad to be reduced by the want of more arms to lay down those they had in their hands, and thus leave the world in safety and repose.

The insular position of Great Britain and Ireland, crossing the line of navigation of the northern nations, a narrow channel dividing these islands from the continent, give to the British empire the means of commanding the surrounding seas; and to its western squadrons, passing across in two divisions one way, the other the other, every power of self-defence and offence, and of controlling the commercial world.

To prevent as much as possible the bad effects of this new doctrine of "free ship, free goods," under which it would be impossible for the British nation to carry on a naval war, it was judged proper by government that as soon as any decree of restitution, or of condemnation, or further proof should be pronounced in the Court of Admiralty, it should be published in one of the common papers, which should be most impartial and popular, and that a number of impressions from the very same press should be taken off, and sent immediately to the British ministers at all the neutral maritime courts, so that they might be masters both of the facts and the reasonings, and ready to give an answer to the complaints of those courts before any misrepresentations should find their way from heated or interested persons in this or in any other country whatsoever. By this publicity, a confederation of all the northern neutral powers was, for that time, prevented, and the most active and furious agent of the Dutch claimants, in his correspondence, was contradicted and repressed, so that he was actually driven from his agency.

Before this period, (1779,) the *Mémoire Justificatif de la Conduite de la Grande Bretagne, en arrêtant les Navires Neutres*, was drawn up by the then advocate-general.¹ A man of eminence in Holland, could not help owing to Sir Joseph Yorke, the British minister at the Hague, who circulated the *Mémoire* by order of the then government, and to the grand pensionary, the latter of whom said it was damned strong, that it was damned true. It paved the way, and laid a foundation for better sentiments; if it were possible to satisfy commercial people, but that seems impossible.

¹ Sir James Marriott. This has lately been reprinted, and is sold by R. Bickerstaff, Strand.

The French revolutionary government had no sooner got rid of the regal, than they seemed to be determined to change every thing; so that there might be a new language and a new set of ideas among mankind, until all the old ones should be forgotten. That this alteration did not proceed from the frivolousness of the French character, merely, is very apparent. The policy is obvious, and it can be very little doubted what order of men have been and are at the bottom of this revolution, when we recollect under the monarchical government and influence of the house of Bourbon the republic of a religious society. A republic independent of all other political, commercial, and religious associations it certainly was, and consisted of more than 20,000 members of the first learning and abilities, following the institute of a military founder and madman, scattered either openly or in various disguises in all courts, and over the whole face of the globe. The epithet of the French republic sufficiently marks its genius and origin, and to be taken from ecclesiastical language and doctrines, "One and indivisible."

Among other innovations, nothing speaks more clearly the scheme and views of the new legislators to revolutionize the whole world, to pull down the old constituted authorities, and to draw all power to themselves, (in fact acknowledging their own weakness,) than by prompting neutral powers to come forward and act in open defiance not only to their own treaties, but the usages and established law of nations. The stopping, searching, and seizing the ships and properties of neutral nations upon the high and open seas, has always been a matter of great delicacy, debate, and agitation. But to what tribunal could the party who complains of the injury fly but to arms, and to appeal to heaven, if there were no interposition of a maritime jurisdiction of the aggressor? Courts of Admiralty were therefore set up in all civilized maritime countries, where both the subject and the foreigner might apply for redress, with an appeal to the sovereign power of the state, whose cruisers and subjects are supposed to have been guilty of infractions, either of the general law of nations, or of their own laws and instructions. This jurisdiction was of necessity; and where the property was, in that place and country only could the judgment be.

It is singular that in the patent of the judge of the High Court of Admiralty, there is no particular jurisdiction of prize of war or reprisal expressly given. From this circumstance an argument has been raised upon the insinuation of facts of delay, of impracticability of temper, and of want of experience of forms in a substitute. The power of substitution was given by all the former patents under the great seal to the judge, who is certainly the best judge of the

character of his own substitutes in his own court. The regular order of seniority could only influence him. A substitution, only as temporary, was intended, and not to take place constantly and in any great case, except with information and advice, *ad referendum*. Much also was said, more than was true, on the subject of ill health, and the impossibility of going on with business, so that with an omission of acquiring proper information, a distinct commission for judgment of prize was directed to be instantly prepared, without the least communication to the party of too high a rank and character to be treated with disrespect.

The attorneys and practitioners of any other court who should dare, without presenting their complaints to their own judge, to proceed to libel that judge, would never be permitted in a court of chancery or of common law without the utmost indignation. A memorial was secretly obtained to be signed and presented with many false complaints, which came not only from practitioners who were eager to oblige their clients, the neutral claimants, but they arrogated to themselves, as it were, the sole direction of all causes, and approbation and disapprobation of persons, both judges and substitutes. Foreign claimants were taught by some persons to suppose their proctors to be both advocates and judge. No wonder if complaints of expenses were and are encouraged, and the cry of excessive charges echoed and reëchoed by foreign ministers and merchants, when public entertainments were given by certain persons to the maritime *corps diplomatique* and the agents and masters of neutral ships. Foreign consuls and vice consuls had assumed on the French principles a diplomatic character and privileges, denied to them formerly in *M. de Passow's*¹ case, by the whole body of the then foreign ministers. Foreign consuls have since thrust themselves into very lucrative agencies; acting in a double capacity; have been eager for commissions of appraisement and sale, and pressed for further time or further proof of title and documents, at the same time laying their own profitable prolongation of suits at the door of the judge; enhancing the number of causes, (notwithstanding lists were ordered to be hung up publicly in court;) by saying, most equivocally, "that no causes were heard which were not finally heard;" and as if among those causes there were not a prodigious number appealed from the Vice-Admiralty Courts abroad, to the infinitely harrassing his Majesty's ministers and the Commissioners of Appeals in the privy council; and as if no time were to be allowed for production of the necessary evidence and papers, by a very small

¹ The Danish consul.

body of men who attend and practice in many other courts, as well as in the High Court of Admiralty.

In term-time, the courts at Doctors' Commons, with the by-week, (only unobserved in the short interval of Easter term) make sessions of five weeks; there are five courts in a week, in which many causes of great length and importance, testamentary, matrimonial, and ecclesiastical, are heard.

In periods of our history, when the fashion of putting all the great officers of the crown in commission was not introduced, as at the revolution, the Lord High Admiral devolved his authority to his lieutenant, under his own great seal; and there is not a single instance in the history of our laws where the judgment of prize of war or reprisals was not exercised by his lieutenant according to the usage of such exercise, which usage was by the common law of the land, and the law of nations. It appears from Rymer's *Fœdera*, that in no special commission in any case of reprisal was his lieutenant ever omitted to be named *quorum unus*. What has since followed by putting the Lord High Admiral's authority, as well as that of almost all other great officers of the crown, into commission, is well known; and thus every board has become a little republic, and an *imperium in imperio*. Where the concentration and power now rests is obvious. Supposing, therefore, that the power of judging of prize of war and reprisal in peace rests in the crown, delegated by it and by the constitution to the Lord High Admiral, and by him to his lieutenant, in the same way as all judicial powers in the crown are delegated to the king's judges, by virtue of the commission of the great seal, of which the lord high chancellor is the keeper, and subject to no alteration or removal, otherwise than by the act of parliament called the Bill of Rights, it is certain that the judgment of prize is put in motion by the Prize-Act, and given to all Courts of Admiralty, the same being duly authorized: and this act of the whole legislature exactly corresponds with the existing treaties of the crown with all maritime states, who refer by especial articles of treaties the claims of themselves and their subjects to this jurisdiction; and if the court exceeds its jurisdiction, it is the business of the common law, paramount to all others, to limit by prohibition.

The omission of all regular proceedings for the discovering truth, and doing substantial justice, is assuredly wrong, under a popular idea of avoiding expenses, thought to be excessive, by commissions which let foreigners in to be judges in their own causes of complaint;

but which in the regular course are always open to correction, when complaint is made to the judge, and are to be examined by him and his registrar.

The case of the *Oester Ems* has been reported with inaccuracy. It made a most material part of that case, (but no notice is taken of it,) that it came to the High Court of Admiralty for decision, in consequence of the consent and request of all parties. Assuredly nothing more can be wanting to establish a jurisdiction. The lord warden of the cinque ports, who claimed the droit, and was in possession of the treasure, his judge, who became an advocate, the Prussian master himself, who set up the demand of privilege, all prayed to be heard by the High Court of Admiralty, rather than by the Court of the Cinque Ports. The proctor, who was defeated in the latter claim, was advised to appeal to the commissioners of appeal in council. They were of opinion against the lord warden; pronounced for the appeal, and reversed the sentence of which Lord North was in possession in the court below, and assumed and exercised themselves, by reversal, that very jurisdiction against which they pronounced. A common lawyer was the mouth of the council, and refused saying to what other jurisdiction the cause belonged. The party, being 30,000*l.* at least the loser, sat down patiently, and never thought (or thought very little) of a prohibition to the court of appeal; however, it has been said, from pretty good authority, that the affair was compromised; whether before or after the final decree, is not clear. Omissions and additions are not much to be wondered at, when we know who furnish the materials and for what purpose. It is a common saying among all the pleaders of the long robe, "A bad precedent is worth two good ones."

It is to be hoped that the final decision of the case of *The St. Jago* (that case had in it very particular circumstances and features) will never be quoted in the way it has been. Its policy and its justice have been doubted by some people. The history of it will probably one day or other be better known to the whole world. It would have answered every wise purpose of government if an eighth, instead of a tenth, agreed for by Lord St. Helens, (which latter was much less than is given by act of parliament to British recaptors,) had been decreed instantly to the recaptors, and so much of the decree below confirmed, and the rest suspended and deferred for further consideration. Alliance and friendship with the court of Spain would not have been so readily broken; a knowledge of what each party had in their hands, (the court of Spain had immense sums of British

property,) and what each could constitutionally do, would have been obtained.

Too many of the common-law reports, in general so celebrated for lengthening and adorning arguments by an affectation of much study and learning, and that sort of reading never to be read, as well as for justifying one wrong judgment by another, and giving the appearance of justice to injustice, are chiefly the productions of illiterate clerks who misunderstand, and which mark the low characters of the writers who perpetuate "much bad reasoning in much bad language." All arguments upon precedent deserve little to be relied upon. False principles or false consequences are to be found in many reports, and only show how much mankind are disposed to pervert justice under the appearance and pretence of doing it.

It is by the principle, and not by the precedent of the decree, matters should be adjudged: "Non exemplis sed legibus judicandum est." l. 13, cod. et inter. 1, omn. Judic. Licet is qui provinciæ præ est omnium Romæ magistratum vice et officiis fungi debeat, non tamen spectandum est quid Romæ factum est, quam quid Romæ fieri debeat. l. 12, Dig. de Officio Præsidentis. One should suppose that justice was one of the simplest ideas in nature, but how complicated must it appear when we travel from the *tractatus tractatum* down to the latest publications on all sorts of law? Little ought to be our surprise, when we find that German and Dutch "magnificent" professors, as they call themselves, and who in general are only school-masters, are the numerous and principal writers on the laws ecclesiastical, civil, and of nature, and of nations. A Bynkershoek, a Huberus, a Vattel, a Hubner, a Schlegel, a Busch, a Heineccius, a Grotius, or Pufendorf are men who have written to serve a particular private personal, or otherwise some public political purpose. Had the wife of Grotius published her opinion upon some certain subjects, said a reader of lectures upon the Roman and civil law in one of our own universities, she would have been of a different opinion. It is well known that in the foreign universities that whosoever takes a degree (and degrees are mostly taken in law) print and publish theses which they make or are made for them. Nothing can be more ridiculous, when it is as notorious that a thesis may be bought, as well as burghers, briefs, and false passes, for one or a few rix dollars, than to see such things dressed up with all the professorial pedantry of learning, and the authors as theatrically antiquated as if they appeared in trunk hose, jackboots, slashed doublets, great slouched hats and feathers, ruffs or bands. Well might a late fighting and writing monarch exclaim, "*O droit de gens, comment ton etude est inutile,*" to which at

the same time all sovereign princes appeal, and almost all violate it, as if they wished to be judged and approved by the rational and humane part of mankind at the very moment they are guilty of sophistry, cruelty, and deceit, and show how much they despise all other human beings over whom only a providential birth and generation have placed them.

From this reflection, must be excepted the sovereign of this country, as the most equitable upon earth, and who may well say, what was once said by a monarch of France, "That if truth and justice fled from all the rest of the world, they ought to find a refuge in the breast of princes."

DECISIONS

IN THE

HIGH COURT OF ADMIRALTY.

SECOND SESSION, MICHAELMAS TERM, 1776.

THE DICKENSON, William Merton, master.

[Droits of Admiralty.]¹

CARGO — Flour, candles, wax, staves, belonging to the rebels of North America, calling themselves the Continental Congress.

Ship — Property of Bayard, Jackson & Co., of Philadelphia.

Voyage — Sailed February 16, 1776, from Philadelphia, bound to Nantz, in France, and from thence intended back to Philadelphia.

On March 30th, in the voyage to Nantz, the master having opened his instructions at sea, that they were to load back with ammunition and warlike stores, Sands, the mate, and the rest of the crew, being acquainted by him with such instructions, resolve to take

* the command from the master, and take possession of the [* 2] ship and cargo in his Majesty's name.

They accordingly do so, and sign a resolution, and on April 7th arrived at the port of Bristol, notwithstanding offers made by the master to induce them to perform the original voyage, for a reward of six months' pay extraordinary.

In Kingroad they are hailed by the merchantmen, and the king's tender, The Rose, "From whence?" Answered, "From Philadelphia."

At a place called Pill, the surveyor and officers of the customs came on board. Surveyor puts two tide-waiters on board, and ad-

¹ [For other decisions as to droits of admiralty, see The Aquila, 1 C. Rob. 43, and note; The Rebecca, 1 C. Rob. 230.]

vises Sands to set off for Bristol and deliver up his papers to the collector.

He goes up half a mile higher, and then leaves the ship in the charge of the second mate and tide-waiters on board. After the ship had been moored head and stern at Bristol quay an hour, the lieutenant of the tender came on board to make a seizure of the ship and cargo.

She remained afterwards in the care of the crew, with the tide-waiters on board, and a person left by the lieutenant.

[* 3] * All the material papers were brought in to prove the property of the ship and cargo, and the rest accounted for, being left (as said in the affidavit of Sands) in the hands of Lord North, not being proper to be divulged.

Parties in the cause, claiming the ship and cargo to be condemned to them :—

1. The *King's Procurator-General*, appearing for William Chamberlain, Esq., as his Majesty's nominee by warrant under the king's sign manual, in his office of treasury, as for a forfeiture to his Majesty, and receivable in his exchequer, against all parties.

2. *Mr. Lushington*, for Anthony Metherel, lieutenant of The Rose tender, claiming the forfeiture under the act of parliament, and his Majesty's proclamation, as captor.

3. *Mr. Gostling*, procurator for the king in his office of admiralty, as for a droit and perquisite of admiralty, being taken by persons having no commission from his Majesty, claimed the ship and cargo in opposition to the king's warrant, and the interests of Lieutenant Metherel.

[* 4] * The judge of the admiralty had, upon a former court day, pronounced the ship and goods "to have belonged to inhabitants of the rebellious colonies in America, and as such, or otherwise, liable to confiscation, and condemned the same as lawful prize, reserved to whom the same of right belongs." Commissioners were named on each side to appraise and sell the same.

All facts being agreed, the cause came on upon the merits.

Dr. Harris, Advocate of the Admiralty, insisted that the right of beginning was with him, and that the act (or expositions of facts for the information of the court) was theirs.

The *King's Advocate* insisted that the act was as much one proc-

The Dickenson. 1 H. & M.

tor as another; that the style was "upon petition of both proctors." But that, in a cause where the king is interested, his own advocate has the right of preaudience everywhere; but if the judge thought otherwise, he should be obliged to submit, and sat down.

Dr. Harris then acquiesced, and the *King's Advocate*, at the assent of the judge, *rose again and opened the cause. [* 5] The *King's Advocate* then threw out that, from every rule of decorum, and the respect due to his Majesty's warrant under his sign-manual, he hoped the inferior officers of the crown, and of a subordinate board, did not come there to oppose it without also having a proper authority from the Lords of the Admiralty; that it was no light matter for inferior officers of the crown to act of their own heads, and oppose the king's warrant and sign-manual; that, at such a crisis of public confusion, and in questions of such a delicate nature, he thought it right to have his own justification, and should be always jealous of solicitors of boards and proctors taking upon themselves to act as they thought proper in the king's causes; that subordination must be maintained, or every thing would be in complete confusion; that his majesty, by the constitution, did nothing but by order in some board, and countersigned by its commissioners.

To this, *Mr. Seddon*, the Solicitor of the Admiralty, and his deputy, *Mr. Dyson*, who were present, made no reply; but *Mr. Gostling, jr.*, the Proctor of the Admiralty, *said he had no [* 6] orders from the Lords of the Admiralty to proceed, but received his instructions from the solicitor; and that there was a letter from *Mr. Stephens*, Secretary of the Admiralty.

The JUDGE said he did not understand these warrants from the treasury board. Such matters wanted no authorization to be proceeded in; for that the King's Proctor on one side, and the Proctor of the Admiralty on the other, might appear as they pleased, and it was to be supposed always by the court that they are well warranted in what they do.

Observation. It is usual and necessary, in many cases of common suits, for the proctor of a party to have a special proxy, under the hand of his principal employers, to do certain acts of moment in the Ecclesiastical and Admiralty Courts; but the judge not thinking such authority necessary here, only shows that the doctrine is suited to the justification of the judge himself; but that, if any thing goes amiss, the king's law officers may be saddled with the blame, and

perhaps with costs, and lay under the lash at the pleasure of the court.

[* 7] * The *King's Advocate* replied, that, as to the novelty of the warrant, it was a new case; that new cases and a new crisis required new forms; it was enough for him that his Majesty's warrant was his authority; that he was ministerial, and to obey his superiors, and had nothing more to do than, as far as by law he might, to carry into execution the views of the king's government. He did not pretend to say the warrant made law any more than a proclamation makes it, nor was it an authority binding upon the court; but it deserved respect, as in the Ecclesiastical Prerogative Court, in the case of the effects of bastards dying intestate, whose effects escheat to his Majesty, in his exchequer.

However, he did not (after the court had expressed already its sentiments) wish to push the matter further, and would suppose, on Mr. Gostling's assertion of some sort of letter from Mr. Stephens, that it was true that he had proper authority to proceed; and he did not desire the question in general to be delayed on this account, as all parties were amicably before the court to take its opinion.

[* 8] * He conceived the general question to stand upon the act of parliament, and the terms of it; also upon the objects described and in contemplation, whereby the Lords Commissioners (who are a board merely executive) are empowered to execute the office of the Lord High Admiral, but without droits, as profits or emoluments to themselves, which are especially reserved in their patent to his Majesty's only use and behoof; and lastly upon the particular circumstances of this case, in which there was a revolt and coming in from the enemy.

That it would be incumbent on the counsel for Lieutenant Methel to show that he was taking within the meaning of the act, and that the ship was not already taken in his Majesty's name, and a forfeiture to the crown.

That if Methel is not a captor, then it would be incumbent on the officers of the admiralty to show that the ship and goods of the inhabitants of the colonies, declared rebellious by act of parliament, and enacted to be forfeited to his Majesty, are droits and perquisites of admiralty, and as such are to be collected and received and

[* 9] accounted * for by the officers of the lords commissioners, by virtue of their commission.

Lastly, they must show that the circumstances of the revolt do not vary the case, under the decision of the privy council in 1665.

In regard to the general law of prizes taken from the enemy, there

is no inherent original right in any person, but in the crown only, and from thence it flows *derivativè* as from the fountain of all property, either by grant and usage, or by his Majesty's assent in parliament, and by his royal proclamation for distribution in manner and proportion.

It must be admitted that before parliament gave the whole of prizes to the captors, (rather imprudently perhaps,) the whole of such prizes as were taken from *justi hostes*, (just enemies,) as the civilians term them, and *in bello legitimo*, by persons not having public commission, was anciently granted by general words to the Lord High Admiral, by the king's patents, together with wreck of the sea, flotsom, jetson, and lagon, and derelict, and goods * of [* 10] pirates and rebels, by which must be understood convict. Some of these were granted by general words of divers droits, as well as others by special words.

We all know that the Dutch wars were intended to fill the empty coffers of Charles II. and his brother, by prizes.

The emoluments, however, occasioned a difference between the king and his Lord High Admiral, which it was thought proper to settle by a solemn hearing at the council-board, in March 6, 1665-6.¹

It appears by Sir Lionel Jenkins's state papers and reports, that a dispute had arisen previous to the date of the decision. Dr. Budd, one of the advocates for the Lord High Admiral, drew up a representation of the droits of the Lord High Admiral. Sir Lionel (who was judge of the admiralty) reported in favor of most of them. For the Admiralty Board not only then, as they do still, wrote to the judge, who is styled their lieutenant; they wrote to the judge for his opinion, beforehand, upon seizures, but he was even directed by the king's commissioners at that time of day how he should proceed, and he stopped or went on * just as they ordered [* 11] him, for political reasons. Sir R. Wiseman, the King's

Advocate, and the rest of the civilians and common lawyers, as it appears, all varied in their opinions; so no argument in respect to the present case can be drawn from those opinions previously given, before the decisive order of council drew the line, and thereby separated the interest of the king from that of the crown, in the person of his Lord High Admiral and his office.

But it appears that soon afterwards the king felt some inconvenience arising politically from suffering these droits to go through the hands of the officers of the Lord High Admiral.

¹ [See *post*, p. 50.]

The Duke of York by deed assigned all droits to the king. Prince George of Denmark had droits in his patent, but re-assigned them to the queen.

The Earl of Pembroke did the same.

The powers of a Lord High Admiral were so great and extensive, that they were thought to tread upon royalty itself. They were restrained by parliament in very early times, and the office was put

into commission at the revolution; and whenever the office
[* 12] *is in commission, "all droits, perquisites, and emoluments, heretofore¹ granted to Lord High Admirals by express words, or otherwise, are declared to be reserved for his Majesty's sole use and behoof."

The power of collecting and receiving only remains with the officers of the admiralty, accountable to the Lords Commissioners of the Admiralty, who are any three of them to give discharges *et quietus est* to the collector. So far the grant goes: but by course of office the lords are accountable to the exchequer, and grants of the droits are made by the king's warrants in the treasury, upon petition.

The commission of the collector of the droits from the Board of Admiralty is before the court; but it has not been read by the other side.

It extends to many things not consistent with law, and the authority of the judge, such as making the collector agent and commissioner for all goods and ships taken, appraised, sold, &c., &c.

The Board of Admiralty being merely executive, and as trustees for his Majesty, and as an inferior board of revenue in the
[* 13] *case of droits, is always subject to be superseded by the superior authority. Sir Lionel Jenkins expressly says, vol. 2, p. 765, that the king's prerogative of seizing enemy's goods is concurrent with the Lord High Admiral's.

It is established law, that all grants of any powers of the high prerogative of the crown are to be interpreted strictly, and the things granted must be well supported by express words, and the usage. Nothing, therefore, can be held to be a droit, which never existed at the time of the grant, and therefore could not possibly be in the usage, nor in the contemplation of it.

It was justly observed by the court lately, in the case of The Aletta, that the goods of the rebellious colonies were the goods of no such enemies as were privileged on board of Dutch vessels, within

¹ Vide the words of the present commission.

the view of the treaty of 1673-4 with the States General, and that therefore it does not extend to the case of the Americans in arms against this country.

It is not asserted that there are no droits to the king in his office of admiralty, but that the ships and goods of the inhabitants of the rebellious colonies, being declared forfeited to his Majesty, are not droits.

* The act neither takes away old droits, nor makes new [* 14] ones.

The word is forfeiture, and when the word prize is used, it is only a subsequent to the forfeiture being first adjudged. For the right of the king's officers, as captors, is only in expectancy, after being first adjudged lawful prize, not prize of war, but of forfeiture, first vested in the crown, and from that period, and not till then, in the commissioned officers, seamen, and soldiers, subject to such proportion and manner as shall be set forth by proclamation.

A new crime arises unforeseen by the legislature. It is declared by parliament, and a new penalty is provided for restraining it. This escheat and forfeiture newly created is not given to the Commissioners of the Admiralty by the act; nor could it have been in the purview of their commissions. The act is clearly, in its operation, a bill of attainder. It punishes without the forms of judgment, or conviction and evidence. All the inhabitants of the rebellious colonies, however innocent, are involved, who come not under the particular exceptions of the act, and their ships and goods are escheated to the king.

* His Majesty's officers and seamen, being captors, have a secondary right, and none but they and his Majesty can [* 15] have the property of the seizure; the one by a direct, the other by a derived right.

It is unnecessary to go into all the law of forfeitures. Royal escheats, says Lord Coke, 3 Instit. 111, are those forfeitures which belong to the ancient rights of the crown. So where a person commits treason, his estate shall escheat and be forfeited to the king.

A rebellion is a confusion of all civil rights, and differs much from the nature of a just war.

The relative positions of persons and things, and consequently the reasonings upon them, are and must be entirely new in the singular and unfortunate state of Great Britain and her colonies: And no new law can give new droits, which it has not expressed.

It is to be bewailed, that the act is so far from being clear, that whoever drew it had no other idea than as of an act for prize of war,

and formed it on the plan for condemnation of ships taken in the Spanish and French wars.

[*16] *Hence the word prize is introduced in the end of the clause; I mean the second clause, which vests the sole property in the captors, after being first adjudged lawful prize. The first clause declares the ships and goods of the enumerated colonies in rebellion, to be forfeited to the king. But giving that word prize all its force, it must be understood to be prize of forfeiture, for cause of rebellion, not of war; that the word prize follows, not leads the proposition in the act of parliament, and that in order to be adjudged prize, a ship must first be adjudged to be forfeited.

Cases have been searched for in vain, owing to the confusion of our admiralty office, for the information of the court; but if any had been found, the precedents of the Lord High Admiral's ancient droits would not have fitted the case of this singular state of hostility, and of the terms of the act of parliament.

Whatever cases there are upon private notes of authority, they should be fairly stated.

Before the cruisers' act of Queen Anne, in 1708, all prizes of war taken in port *were condemned to the Lord High Admiral, although taken by men-of-war.

The St. Nicholas du Tot, taken by a man-of-war, Nov. 15, 1708, was condemned to the Lord High Admiral.

The John, Royt, master, 25 Nov. 1702, had the same decision.

But after the act took place, in 1708, giving the sole property to the captors, although the prizes were by an order of council settled to be condemned to the Queen, in her name, and proceedings to be as usual, the Lord High Admiral had no droits of vessels seized in port by the Queen's men-of-war.

The Voorsighteyheight, first seized in the harbor of Falmouth by The Pembroke man-of-war, was condemned to The Pembroke man-of-war, July 30, 1709.

This case would have been strong in favor of Metherel, if the ship Dickenson had not been already seized by others in the king's name.

In the case of The Adventure, Brother, master, May 17, 1709, the custom-house officers seized for the king; and the officers of the admiralty also seized in port, and prayed condemnation in

[*18] admiralty. *But the custom-house officers prayed a prohibition on the 3d and 4th of Queen Anne, as being an importation contrary to law; it was argued; and the prohibition was granted, Lord Chief Baron Ward averring, that the importation, which was of prohibited goods, was a forfeiture to the crown, antecedent to the seizure for the Lord High Admiral. Determined June 3, 1709.

On appeal to the Lords, of cases of forfeiture, on account of torture, they were not condemned as droits to the Lord High Admiral.

The Hope, Ostram, Nov. 13, 1710; Anne Galley, Patton, April 4, 1712; St. Nicholas, Neal, Oct. 15, 1712; were all condemned by the Lords to the queen.

But as this case ought to be argued with candor; although these notes are taken from great authority, they do not mention the particulars, and we have searched the register-office to no purpose, as it is in great confusion.

The drawer of the act of court in favor of the admiralty has ventured to define a revolt, and says it is a departure from duty, and that the seizors did not revolt from their duty, being already good subjects. The *admiralty proctor, who drew the act, forgot [* 19] the old law maxim, that *omnis definitio juris est periculosa*, every legal definition is dangerous. The nature of all human language, (so inadequate to our ideas,) and of our ideas (so inadequate to things) is such, that it is almost impossible to define any thing so exactly, but too much will be added, or too little will be expressed.

It is indeed a very convenient way for counsel to raise an argument, by giving a definition, or by stating a false principle to hurry on to a conclusion. Thus you may argue forever, and draw consequences from false premises *ad infinitum*.

A revolt means not a departure from duty, as Mr. Gostling defines it; but it is a coming over from the party to whom a person has actually belonged, adhered, or was in the pay and service of; as these men were in the pay and service of the congress, and of rebel officers; who freighted their ship for rebellious purposes.

It would be very difficult indeed to fix the idea of revolt, if the idea of duty is to be joined to it; we must then go into all the *questions of religious, moral, or civil duties. But the words [* 20] of decision by order of council, in 1665, clears the point. What are the words? All such ships as shall voluntarily come in, upon revolt from the enemy, do belong to his Majesty. It is clear, that a coming in voluntarily from the enemy, in whose power the parties were, is a sufficient cause for establishing the king's right distinct from the Lord High Admiral's.

The coming in from the enemy is a revolt. Any such definition, as stated by the other side in their act, as mere chicaning upon the plainest words imaginable.

This argument cannot be concluded, without saying something upon sentences in causes of condemnation under this act.

The sentences of the court must conform themselves in their style to the terms of the act of parliament.

The style upon the War Act will not suit this subject, nor the times which have given birth to it.

The War Act only said, that prizes taken shall be the property of the captor. But here this act expressly says, that all the [* 21] ships and goods of the inhabitants of the * rebellious colonies shall become forfeited to his Majesty; they must therefore be adjudged forfeited accordingly. And when the act goes on saying, "as if the same were the goods of open enemies, and shall be so adjudged, deemed and taken in all Courts of Admiralty," if there is any grammar in the world, the word forfeited is the antecedent, and the term to which every thing that follows is relative. It means also that they shall be proceeded in by monition, and by other modes prescribed by the act; and where the act does not mark the line, then the proceedings are to be in such forms, as if the same were in a lawful war, according to the usual course of admiralty proceedings; but still as forfeited to the king, simply and plainly; and the act of itself establishes no droits in the office of admiralty, because it declares none.

In such way, therefore, and in such style as the act of parliament declares the forfeiture, we pray this ship and cargo to be condemned to his Majesty, absolutely and simply; the prize or its amount, to be delivered to the nominee of his Majesty's warrant, and consequently to be accounted for in his Majesty's exchequer.

Arguments.

[* 22] * ARGUMENTS ON THE PART OF THE ADMIRALTY.

DR. HARRIS. The warrant of the crown on which the king's advocate relies, is no authority to the court, and the prayer that the ship and cargo should be condemned in the exchequer is equally strange. There can be no condemnation here to the king in his exchequer. Every prize must be condemned either to the king in his office of admiralty, or to the king as taken by his officers, since the act has granted the prize to them.

The King's Advocate is called upon to show any precedents, where ships of the enemy, taken by persons not commissioned, have ever been condemned to the king absolutely and simply.

In regard to the claim of Methrel, he is no taker. In the case of The Brilliant, which came into the port of Kinsale, and a midshipman towed her in, it was condemned as a droit of admiralty.

In regard to the patents of the Commissioners of the Admiralty, and of the Lord High Admiral, Sir Lionel Jenkins says in his report,

that among other droits there * were conveyed to the Lord [* 23] High Admiral *casualia*.

It is agreed by all the advocates who reported at the same time, that ships, taken in time of war by persons not commissioned, were to be adjudged as perquisites of the Lord High Admiral.

The act of parliament plainly considers the present case as a case of war, and the clause (declaring the ships and goods of the inhabitants of the colonies enumerated to be forfeited, as if they were the ships and goods of open enemies, and shall be so adjudged, deemed and taken in all Courts of Admiralty, and all other courts whatever) plainly considers such captures as prize of war, and to be proceeded upon in the same course; and so the commission to the judge directs him to proceed according to the course of the admiralty.

In regard to the distinction taken of a revolt, it will not hold; for it must be a revolt from the enemies; now these persons were not enemies, and did not revolt from their allegiance.

Dr. Harris pressed for costs against Metherel, as having obstructed the proceedings.

* Dr. Wynne, on the same side, went over the same ground. [* 24]

Although no droits, no profits, or emoluments are vested in Lords of the Admiralty, yet the power of collecting them is in the commission of the Lords, they accordingly appoint their own collector by their own commission.

The prayer in the act on the part of the crown is very strange; that the ship and goods should be condemned as the effects of the inhabitants of the rebellious colonies, forfeited to his Majesty, absolutely and simply, pursuant to law, and by virtue of the said act of parliament, and receivable immediately in his Majesty's exchequer, agreeable to his Majesty's warrant under his sign manual, countersigned by the lords commissioners.

Here is a puzzledom in the act; and as to the authority of the warrant as binding upon the court, that is given up.

It is said, this ship is not prize of war, but prize of forfeiture; but it is certainly prize of war. The act of parliament uses the word lawful prize in general, and the act is a declaration of war. It is his Majesty's prerogative solely to declare war; and this act * for prohibiting all trade and commerce with the inhabitants [* 25] is, although awkwardly and obscuredly drawn, the very counterpart in general of the old act of prize of war.

There is not a word of the exchequer in the whole act, and the commission to the judge speaks only of proceeding according to the course of the admiralty.

The sentence of condemnation already has condemned the ship

and goods, not as a forfeiture, but as a confiscation and as lawful prize, reserving to whom the same of right belongs.

The King's Advocate has carried up too high the inherent right of the prerogative of the king, to all prize of war. Anciently fleets fitted out were the ships of the subject; the king had one fourth of the prize, the Lord Admiral had two fourths, and the rest was divided; and so it is laid down in the black book of the admiralty.

But from the time there has been a royal navy, it has been otherwise. In Queen Anne's time, at the beginning of the war, the queen had half, the Lord Admiral had his tenths; but privateers had [* 26] the whole. Upon the Cruiser's Act, which gave the * whole to the captors, matters were altered, and by the American Act the prize offices were suppressed.

Now the present question may be put on this issue, Can they produce a case in seventy years, where there has been any condemnation to the king of prize, taken by persons not commissioned, but in the office of Admiralty?

Is there any new right, or will it not be very inconvenient that the course of business should be altered from its usual mode of proceeding?

In regard to the revolt, there was no coming over of rebels from rebels, no change of allegiance. Dr. Wynne pressed costs against Lieutenant Metherel, and said that the service would be ruined if commanders of king's ships were to have ships of the enemy in port; for that they were given too much to sleep in harbor.

Dr. Calvert, for Metherel, contended, that neither the king absolutely, nor in his office of admiralty could have the prize, if there was a taker being a commissioned officer.

[* 27] * That neither the revolted were takers, nor the custom-house officers, and therefore the king's officers of the navy, who seized after the ship was moored, had the sole property by virtue of the act; for nobody has a right to take under the terms of the act, but the officers, seamen, and soldiers, on board the king's ship.

All the cases of ships taken in port, condemned to the Lord High Admiral, were before the Prize Act of Queen Anne in favor of the navy officers, and quoted the case of *The Voorsighteyheit*, condemned to *The Pembroke*. This case was decided by the Lords after the act had given away the queen's right of prize to the captors. This case he said the King's Advocate had furnished him with. That the superseding Metherel's claim would be a great discouragement to the king's service.

The King's Advocate replied, that he was astonished to hear the

Advocate for the Admiralty, and the gentlemen with him press for costs against Lieutenant Metherel, and wondered who had instructed them to push such a point. He would not say a word for his part to hurt the officers of * the navy, although in this [* 28] case he could not admit Lieutenant Metherel to be a taker within the act.

As to the king's warrant, he thought the meaning of that being used on this occasion was already well understood by the court, and explained by himself, not as an authority binding on the court, but an authority to himself to appear before it, and assert the king's right. That there was too much reason to think from the late decisions here, and from other reasons, that every thing relating to the seizure of the American ships was upon tender ground, and in coming before the court no more was meant than to have a proper justification for the king's first law officers themselves; to take the opinion of the judge in an amicable way, with which opinion, whatever it may be, he should be satisfied, if his superiors shall be so; and therefore in such a cause every matter should be treated with the utmost delicacy and decorum. He was therefore infinitely surprised to hear any misrepresentation of his words, or a want of candor on the other side, by counsel concerned for any subordinate part of the king's * government, upon a question of prerogative claimed [* 29] by both sides. He had ever made it a rule of conduct ever since he had been at this profession, in no cause whatsoever to represent a gentleman's words with the least perversion, or to state false facts, or false quotations. Nothing is so easy as by misstating the expressions of the opposite side to raise an argument and to reason on forever. There is no ingenuity in all this, but it is a practice too common at another bar, and beneath every man who would have the character of a lawyer supported, as it assuredly may be, on the footing of a real gentleman and a man of honor. He would answer the arguments *seriatim* of both the learned gentlemen. The word puzzledom was a new word; he could neither find it in the dictionary, nor in any part of the prayer of the act; and he neither loved puzzledom or quibbledom, nor declamation. He would meet the gentlemen on fair grounds of arguing in a cause where every thing was to be laid before the court, so as to aid it in forming a judgment; and in which all parties would most probably acquiesce as perfectly satisfied. To the * assertion, that there is no distinction [* 30] between the right of the king to prize simply, and to prize in the office of admiralty, is clearly answered. There is such a distinction, even when there is a Lord High Admiral; a much greater creature of royal prerogative, than the mere executive board of com-

missioners ; and this is proved to a demonstration, by the decision of the order in council in 1665. There the line is drawn between the king and his admiral ; and although in the dust of ages, and the confusion of office, precedents on all sides lie buried, yet condemnation to the king of his rights must necessarily have ran after that decision, in a different style to the condemnation of the Lord High Admiral's rights.

The style in the case of ships taken by the king's men-of-war is, "condemned to our sovereign lord the king, taken by such and such persons, commander, &c." so far is the proposition from being true asserted by the council on the other side, that no prize to the king is condemned in the admiralty, but only in the style of condemnation to the king, in his office of admiralty.

[* 31] * The chain of precedents, to show that the droits of the king in the office of admiralty are condemned there, is admitted ; but it proves nothing against the forfeitures to the king under the present act of parliament. Because this is our proposition, "The ships and goods of inhabitants of the rebellious colonies, coming and going from thence and forfeited to the king, are no droits, but are forfeitures."

You cannot reason from the War Prize Act to this act, prohibiting the trade of the American rebellious colonies, and making all their property in their ships and cargoes to be escheats to the crown. All escheats and forfeitures are not confiscable in the exchequer ; these which arise out of a new crime and a new law made to punish that crime are made confiscable here ; we do not pray to have them condemned in the exchequer, but we say, when condemned they will be receivable there. I do not mean the Court of Exchequer when I speak of the receipt of the exchequer. Sir Lionel Jenkins, in his report to the king and council, does not say that *casualia*¹

[* 32] are * conveyed to the Lord High Admiral, but *bona casu fortuito reperta*, and even there he says expressly, that the king has a concurrent right with the Lord Admiral. He speaks of only two precedents being to be found of the Lord Admiral having ships in port, and then he says it did not appear by whom taken ; and he gives the preference to the king's ships before the Lord Admiral.

But after all, in regard to his report, (although he was judge,) and Sir R. Wiseman's, the King's Advocate, and Sir William Turner's, the Lord Admiral's Advocate, and Dr. Budd's representations of the Lord Admiral's rights, they were all mere opinions till the point was

¹ Vide argument of Dr. Harris.

finally decided at a subsequent period, by the order of council in March, 1665-6, and all those opinions varied upon the subject of the Dutch war, as much as ours do upon the present subject of the American rebellion; in which every thing is novel.

Sir Lionel's opinion was an extra-judicial report; and it is something singular, even in these times, that the Lords of the Admiralty call upon their judge for reports.

* I very much doubt, in the present case, whether the Ad- [*33] vocate of the Admiralty has reported this ship to be a *droit*; and I am exceedingly jealous of solicitors and proctors of any boards carrying on suits without a sanction and authority from their superiors.

But we are told it would be improper and inconvenient to change the course of proceedings. The answer is, you must change the proceedings; they must fit the subject-matter. There is a strange disposition in many men to start at every thing that is novel; the argument is, *ab ignavia ad ignaviam*, from the idle to the indolent; and who would fit every leg, however sore, to the same boot. If the act of parliament had been better and more carefully drawn, it would have saved much confusion, by being better fitted to the business of this peculiar rebellion, which is very different from a war with Spain and France, and has very different consequences, both legally and politically. But here a new crime is declared, a new law is made, new proceedings must be had, of course, to carry it into execution, unless we mean to embarrass government, * and [*34] add to the confusion. It is a saying in some civil law books, very just, *Mutatis hominibus quid obstat mutari sententiis?* Change the state of men and the laws, and their decisions must change with them. In other words, new men, new measures; new principles, new consequences.

There is no wisdom in opposing a violent stream; and the man who does so, under an idea of avoiding difficulties and remaining at his ease, will only increase his uneasiness and perplexities in the end. I love not novelties in religion, law, or politics more than any man here; but there is a time and tide of human things, which bears down all before it, like a flood.

The king's warrant in this cause is new, it is said; but is that any reason to alarm a court? Is not the judge's warrant in all these causes of forfeiture for rebellion new? The commission by which this cause is heard? and from the terms of which they argue? But show precedents, it is urged with an air of triumph? I answer, show thirteen colonies of British subjects in arms against the mother country; a naval force * and immense army on the [*35]

part of the colonies, who have declared themselves independent, and assumed sovereignty.

A new scene is this, astonishing to all Europe ; such as if any man had predicted twenty years ago, it would have been thought a sufficient reason for a statute of lunacy against him, and for his confinement. Yet the counsel on the other side argue against novelty in proceedings upon an act intended to restrain this rebellion, which is of a species never known in the history of the whole globe, (for I do not admit the case of the Netherlands, which were not colonies of Spain, to be analogous,) and to which evil we hardly know how to apply the remedy of the laws, but that of force, with which the constitution is armed.

The warrant of the crown in the case of prizes, not granted away to the subject by royal declaration or act of parliament, is not a novelty. But where are the precedents on the other side of admiralty droits of the goods of inhabitants of the rebellious colonies forfeited to the king?

It is true the act uses the word prize, and does not use [* 36] the word exchequer ; it is answered * by us, it does not use the word droits of the admiralty, nor of perquisite, when any ship is forfeiture to the king : then, and not till then, it becomes lawful prize. Under this act, if there were a Lord High Admiral, he ought not to have this forfeiture ; and as to the king's officers under this act against rebellion, as under the late act for war, the captor has no right immediate to the capture till after it shall have been adjudged, that is, until it shall have been finally adjudged lawful prize to his Majesty ; and all the interest of the captor is only a secondary right, dependent and in expectancy, the primary right being to his Majesty, and the capture being first, according to the usage and style of the court, condemned to our sovereign lord the king, and moved and prosecuted by the king's own advocate and procurator general, in his Majesty's name ; and the monition citing all persons having interest to appear, being taken out by the latter from the proper office of the court.

As "lawful prize" follows consequential of forfeiture, so escheat receivable in the exchequer follows consequential of forfeiture.

[* 37] * I meant the receipt of the exchequer, not the judicial court of the exchequer ; I do not mean to infringe the jurisdiction of the Admiralty Court : though I must add it derives its whole authority in matters of prize of war and forfeiture from an occasional act of parliament ; otherwise doubtless the Court of Exchequer might interpose judicially which has a standing jurisdiction in all matters touching the king's revenue, and all profits acquired to the crown.

The Dickenson. 1 H. & M.

There has been something quoted, but not truly, from Sir Lionel Jenkins, about *casualia*. If we look into the books, we shall find that there is in the constitution of this country an officer at the exchequer called the king's escheator, of very ancient establishment under the lord treasurer, whose business it is to inform of escheats and casual profits of the crown, and to seize them into the king's hands, and who accounted to him, Co. Litt. 92, and concerning the deference to be paid to the nominee of the crown and the king's warrant, see 1 Salk. 37.

I am not very fond of pedantic dissertations, but as a very learned gentleman has *quoted the black book of the [*38] admiralty, I shall put him in mind of the red book of the exchequer. I believe there is also a black book of the exchequer as well as a red one; so they have two to one against the admiralty. And if we dispute about the prior authority and antiquity of them, we may dispute till the day of judgment, and find no end of the question. But when he says I carry too high the inherent right of the high prerogative of the crown to prize of war, I am clear that I am not wrong in it, at least nothing that he has quoted from the black book of the admiralty has proved me wrong. I sat out with saying, that all persons derived their right to prize either from the king's grant or from his assent in parliament. When the Lord High Admiral had his share of prize, before the fleets were any thing more than ships and men, pressed by the admiral's warrants by the king's orders, for the defence of the realm, he had this share by grant from the king. He had wreck of the sea, and so have some lords of manors; but they have it by grant, and they must have these things by especial words, and not by general *ones; for otherwise the [*39] crown would be stripped of every prerogative. The crown being trustee for the subject, the alienation of its rights and powers by general words is, by law, strictly to be guarded against. It is well known in our law that the king is universal occupant, and that all property is derived from the crown; that under circumstances it escheats and reverts to it; and that the goods of the enemies of the state are acquired to the head of the state, for the benefit of the state, unless a particular law or royal grant otherwise gives a secondary interest. As all property is the child of society and of public consent, so by every law of nature and civil compact it reverts and concentrates in the head, who represents the whole association.

The learned gentleman, who says there is a puzzledom in the act, has puzzled himself, and has fallen into a like contradiction. I like the act as an embarrassed obscure performance as little as he does, and never was consulted about a syllable in it. But I suppose we

shall understand it all of us better one day or other. I said the act was a bill of attainder in its operation, call it what you [* 40] * will in its title ; because it involves all the inhabitants of the rebellious colonies in penalties of forfeiture for the crime of many. It was so understood both by administration who defended it and by those persons who opposed it in the House of Commons. One party said it was unjust and inhuman ; the other said it was necessary, and that distinctions in the moral and natural world were in many cases in this life impossible, till Providence shall close the whole, and discover the great end of all things. That the innocent have a remedy to form counter associations ; they must rise against the authors of their calamities.

The learned gentleman insists the act is a declaration of war, which the king, he says, can only declare ; what is this, but to get upon the ground of argument used by the rebels, that this war is not the king's war, but the parliament's war ?

The argument drawn from the terms of the last provisional interlocutory decree, which reserved the question to whom the ship and cargo of right belong, and condemned the same "as prize," without using the form in the act forfeited, is very uncandid and [* 41] * unbecoming in a cause where we are all to inform the court ; to be clear, and not subtle.

In the first place, the drawing up of that interlocutory decree was not attended to at the time, and of course not objected to in point of words ; for if it had been objected to then, we must have gone at that time into the whole of the present question. 2d. If the interlocutory decree is ill worded, it may be and must be reformed and adapted to the final sentence. 3d. Any registrar's manner of taking down any order, according to his own language and ideas, as in a matter of course, will not bind down the judge upon a final hearing.

The law calls the registrar of a court *oculus judicis*, but he is neither the ear nor the head ; and it is well registrars are not, for otherwise, under the idea of easing a judge, they might determine many a cause ; at least, might have a bias.

It is said that here is no revolt from the enemy. It is so far from being true, that the mate, to the ninth interrogatory, expressly swears that Bayard & Jackson, the owners of the ship, came on [* 42] board, and * were officers in the rebel army, and in regimentals, which he describes, the cargo belonging to the congress. He, therefore, and the rest of the crew who revolted, were their servants ; and the master adhered so perfectly to them that he offered Sands, who was the mate, and the crew, six months' wages, to change their resolution again and to complete the voyage. To

say, therefore, that here is no voluntary coming in from the enemy upon revolt, is a false assertion in the teeth of evidence, and, the definition of revolt being a desertion of duty, is a wretched quibble to avoid the article of the decision of council, in 1665-6, which says that not the Lord Admiral, but the king, shall have a ship coming in from the enemy voluntarily upon revolt. Did not Sands, the mate, revolt from his adherence to his master and the congress?

As to arguing out of the paper, or act of court, it is equally uncandid. This is merely a paper stating facts, drawn up and signed by both parties, for the information of a court previous to a hearing of their respective petitions. This act is handed about and sent from one proctor to another. *It is ornamented some- [*43] times with flowers more than is fit, by practitioners who delight in them; but no counsel ever argues properly from the deductions or reasonings of proctors, but from substantial facts. As to the prayer, it is to be adhered to; there is no puzzle in it. The words forfeited to the king were never in any prize act of war before. To that style of forfeited we pray that the sentence of the court may be conformable. Upon this word the whole argument turns, as in this special act of parliament the whole question is concentrated.

We pray that the ship and cargo in question may be decreed forfeited to his Majesty, and of course, by law to be received in his exchequer.

Mr. Chamberlayne appears not as solicitor of the board of treasury, but as nominee of his Majesty.

The deputy register, *Mr. Bishop*, arose. He said the King's Advocate had bore very hard upon him, for the office of the registry being in great confusion; that it never was in such good order as it had been since his time, and that he had taken great pains in *searching for precedents, and had been always ready to [*44] communicate every thing that was called for.

The *King's Advocate* replied, that he had not the least idea of reflecting upon the deputy register himself, whom he knew to be a very good officer; but that his predecessors were not equally careful of the records of office, as everybody there knew; and when he spoke of precedents not being to be found, the precedents named were of near a hundred years ago, and no wonder if they were buried in the dust of ages; that every public officer ought to be paid for his trouble, and that it merited highly the attention of government, that an office of record, in so important a department as the admiralty, should have its registry put into due regulation and kept in a proper

place, that indexes should be made, and the deputy register be paid for his trouble.

SIR GEORGE HAY. This act is a declaration of war,¹ and the Courts of Admiralty are to proceed to confiscation under it.

The act does not affect the rights of the admiralty — says [* 45] nothing about them ; and * so the Prize Act in time of war said nothing about them, yet they remained to the admiralty.

As to the particular word forfeited, in the act, it is an ill-founded imagination that this makes an escheat. The course² of [* 46] admiralty * proceeding is to be observed ; and as to the operation of the act, my opinion is, that it would be very hard to understand by it that all the American subjects trading to and from America, innocently intending, or smuggling with other nations, in the way usually connived at, are to be deemed rebels, and their ships and goods confiscated.

Before you can condemn, you must prove that the parties have been actually concerned in some act of rebellion.

In this case, the crew did not agree in any act of rebellion ; they seized the ship as American, and confined the master, and delivered her up to the officers of the customs.

The captain is an enemy, and so being dispossessed it brings it within the case of the doctrine that an enemy's ship, taken by per-

¹ The parliament cannot declare war.

² The only course of admiralty cannot have been to pronounce prize to the king in the office of admiralty, or to the captor, because in Charles II.'s time there must have been condemnation to the king of his own share, independent of the Lord High Admiral's ; and, in Queen Anne's time, to herself, of the moiety which was the queen's, from 1702 till the act in favor of captors, in 1708 ; and then by an order of council, dated March, 1708, it was settled that all proceedings for prize were to be in the queen's name, as formerly. Before this act the queen doubtless had her commissioners. The crown does every thing and receives every thing by commission.

Charles II. had his commissioners of prizes, to whom the king's prizes were condemned. Lord Ashley was first commissioner ; and it was owing to the duke's commissioners complaining that they were obstructed by the king's commissioners, that the matter was referred for a solemn hearing before the privy council, in 1661, when the regulations were made on which the King's Advocate now insists. The instructions of the collector of the admiralty droits at this day square exactly with these regulations. The cases of the king's own prizes, which are distinguished in the decision of the council in 1661, make no part of his instructions. And so far is the king's warrant from being a novelty in the present age, that his late Majesty had commissioners of prizes for those which were taken when hostilities began before the declaration of the late war.

sons non-commissioned, is a droit to the king in his office of admiralty.

The men were liege subjects of the king (and not to be considered as rebels); they * did not consider themselves so, [* 47] and for that reason they never revolted from the enemy.

There is a great difference when there is a Lord High Admiral, and when the king acts as Lord High Admiral himself.

These men were not revolting enemies, but the ship came in by good subjects' means, and they deserve their reward. Doubtless government will give it them.

Rebels' goods have always been condemned as droits of admiralty, when taken by non-commissioned persons. Many cases of this sort were adjudged in the last rebellion.¹ There was a case of the ship *The Duke de Vendome*, determined in 1716. The dispute was then the same as now, and it was said that *bona rebellatorum* belonged to the king, independently of the office of admiralty. The cases of the confiscation of the goods of rebels in the Duke of Monmouth's rebellion, decreed to King James II., and moved by Dr. Oldys, the * King's Advocate, were then quoted; but the court ob- [* 48] served that, at the time of Monmouth's rebellion, there was neither any Lord High Admiral nor was the office in commission; the king exercised it himself.

Had there been a clause in the present act, as there should have been, reserving all forfeitures taken by persons non-commissioned to the king immediately, it would have done.

The non-commissioned takers have always been allowed salvage by the court, and I have known half given.

I condemn the ship and goods as a droit of admiralty.

The *King's Advocate* then moved that the sentence might be without prejudice to the right of the salvors. I have very good reasons for this on the part of government.

JUDGE. For what reason? Doubtless you must have good reason.

Answer. For the reason just now given by the court itself, because they deserve it.

¹ At that period, there was no special act of parliament declaring that rebellion, or enacting forfeiture to the king of the goods and effects of persons only virtually rebels, that is, as inhabitants (merely) of rebellious colonies.

I H. & M.

[* 49] *JUDGE. I will not give it now; let the king's government reward them as it pleases.¹

[* 50] * *At the Council held at Worcester House, the 6th of March, 1665 - 6,*

PRESENT,

The KING'S most Excellent Majesty,

HIS ROYAL HIGHNESS THE
DUKE OF YORK,
HIS HIGHNESS PRINCE
RUPERT,
LORD CHANCELLOR,
DUKE OF ALBEMARLE,
EARL OF LAUDERDALE,

LORD FITZARDING,
LORD ARLINGTON,
LORD BERKLEY,
LORD ASHLEY,
MR. SEC. MORICE,
SIR WILLIAM CO-
VENTRY.

WHEREAS, through the long intermission of any war at sea by his Majesty's authority, several doubts have arisen concerning certain rights of the Lord High Admiral in time of hostility, the determination whereof appearing very necessary for the direction as well of his Majesty's officers as of those of the Lord High Admiral; upon full hearing and debate of the particulars hereafter mentioned, the King's counsel, learned in the common law, and likewise the judge of the High Court of Admiralty, and those of his Majesty,
[* 51] &c., his Royal Highness the Lord High Admiral's * counsel, in the said High Court of Admiralty being present, his Majesty, present in council, was pleased to declare,

1st. That all ships and goods belonging to enemies coming into any port, creek, or road, of this his Majesty's kingdom of England or of Ireland, by stress of weather or other accident, or by mistake of port, or by ignorance, not knowing of the war, do belong to the Lord High Admiral; but such as shall voluntarily come in, either men-of-

¹ Sir George Hay afterwards declared privately to the King's Advocate, that he was mistaken in this general decision, and was very sorry for it.

The case of *The Voorsighteyhey*, quoted by Dr. Calvert as cited by the Advocate-General, and that it was condemned to the admiralty, was not so cited; for it was cited as condemned to *The Pembroke* man-of-war, though taken in port; and so decreed by the lords of appeal, 30th of July, 1709, after the act of the Queen in 1708 had passed, giving all right of prize to the captors.

war or merchantmen, upon revolt, from the enemy, and such as shall be driven in, and forced into port by the king's men-of-war, and also such ships as shall be seized in any of the ports, creeks, or roads of this kingdom, or of Ireland, before any declaration of war or reprisals by his Majesty, do belong unto his Majesty.

2d. That all enemies' ships and goods casually met at sea, and seized by any vessel not commissioned, do belong to the Lord High Admiral.

3d. That salvage belongs to the Lord High Admiral for all ships rescued.

4th. That all ships forsaken by the company belonging to them, are the Lord High * Admiral's, unless a ship commis- [* 52] sioned have given the occasion to such dereliction, and the ship so left be seized by such ship pursuing, or by some other ship commissioned then in the same company, and in pursuit of the enemy. And the like is to be understood of any goods thrown out of any ship pursued.

** Extracted from the Registry of his Majesty's High Court of [* 53] Admiralty of England.*

GEORGE the Third, by the grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, &c. To our right trusty and right well-beloved cousin and counsellor John, Earl of Sandwich; our trusty and well-beloved John Buller, Esq.; our right trusty and well-beloved cousin Henry Viscount Palmerston, of our kingdom of Ireland; our trusty and well-beloved Charles Spencer, Esq., commonly called Lord Charles Spencer; our right trusty and well-beloved cousin Wilmot, Viscount Lisburne, of our kingdom of Ireland; our trusty and well-beloved Henry Penton, Esq.; and Sir Hugh Palliser, Bart., greeting: whereas we did by our letters patent, under our great seal of Great Britain, bearing date at Westminster the thirtieth day of December, in the fifteenth year of our reign, nominate, constitute and appoint you the said John, Earl of Sandwich, John Buller, Henry Viscount Palmerston, Charles Spencer, commonly called Lord Charles Spencer, Wilmot, Viscount Lisburne, and Henry Penton; together with our right * trusty and well-beloved counsellor [* 54] Augustus John Hervey, to be our commissioners for executing the office of our High Admiral of our kingdoms of Great Britain and Ireland, and of the dominions, islands, and territories, thereunto respectively belonging; and of our High Admiral of New England,

Jamaica, Virginia, Barbadoes, St. Christopher, Nevis, Mountserrat, Bermudas, and Antigua, in America ; and of Guiney, Binny, and Angola, in Africa, and of the islands and dominions thereof ; and also of all and singular our other foreign plantations, dominions, and territories whatsoever, and places thereunto belonging, during our pleasure, as by our said recited letters patent, amongst other things therein contained, relation being thereunto had, may more fully and at large appear. Now know ye, that we have revoked and determined, and by these presents do revoke and determine our said recited letters patent, and every clause, article, and thing, therein contained. And know ye further, that we, reposing especial trust and confidence in the approved wisdom and fidelity and experience of you the

[* 55] said John, Earl of Sandwich, John * Buller, Henry Viscount Palmerston, Charles Spencer, Wilmot, Viscount Lisburne, Henry Penton, and Sir Hugh Palliser, of our especial grace, certain knowledge and mere motion, have nominated, constituted, and appointed, and by these presents do nominate, constitute, and appoint you to be our commissioners for executing the said office of our High Admiral of our said kingdoms of Great Britain and Ireland, and of the said dominions, islands, and territories, thereunto respectively belonging ; and of our High Admiral of New England, Jamaica, Virginia, Barbadoes, St. Christopher, Nevis, Mountserrat, Bermudas, and Antigua, in America ; and of Guiney, Binny, and Angola, in Africa, and of the islands and dominions thereof ; and also of all and singular our other foreign plantations, dominions, and territories whatsoever, and places thereunto belonging, during our pleasure ; giving and by these presents granting unto you our said commissioners, or any three or more, during our pleasure, full power and authority to do, execute, exercise, and perform, all and every act, matter, and thing which do belong or appertain to the office of our High Ad-

[* 56] miral of * our said kingdoms of Great Britain and Ireland, and of the dominions, islands, and territories thereunto respectively belonging ; and of our High Admiral of New England, Jamaica, Virginia, Barbadoes, Saint Christopher, Nevis, Mountserrat, Bermudas, and Antigua, in America ; and of Guiney, Binny, and Angola, in Africa, and of the islands and dominions thereof ; and also of all and singular other our foreign plantations, dominions, and territories whatsoever, and places wheresoever to them or any of them belonging, as well in and touching all those things which concern our navies and shipping, as those which concern the rights and jurisdictions of or appertaining to the office of our High Admiral aforesaid. And we do further by these presents give and grant unto you our said commissioners, or any three or more of you, full power and

authority to make such orders and issue such warrants, for the repairing and preserving our ships and vessels already built and to be built in harbor, with all things belonging to them and every of them, according to your best directions, and for the well building, repairing, fitting, furnishing, * arming, victualling, and set- [*57] ting forth such ships and fleets as you shall receive directions for, either from us or from our privy council, and also to establish and direct such entertainments, wages, and rewards, for and unto all and every such person and persons as are or shall be employed in those our services, or any thing appertaining thereunto, and further to give discharges for those services, or any of them, as to you, or any three or more of you, in your wisdoms and good discretions, shall be thought fit, in as ample manner and form as any our High Admiral or Admirals of our said kingdoms of Great Britain and Ireland, and of the dominions, islands, and territories thereunto respectively belonging, or any of them, and as any our High Admiral of New England, Jamaica, Virginia, Barbadoes, Saint Christopher, Nevis, Mountserrat, Bermudas, and Antigua, in America, and of Guiney, Binny, and Angola, in Africa, and of the islands and dominions thereof, or of any other our foreign plantations, dominions, and territories whatsoever, and places thereunto, or to any of them belonging, might have done, by virtue of his or their office or * place of our High Admiral, or by virtue of. [*58] any commission granted in that behalf, might do or perform the same. And our further will and pleasure is, and we do hereby strictly charge and command all our officers and ministers of or belonging to our navy or ships, and every of them, now and for the time being, and all others in their several places, whom it may in any wise concern, that they and every of them be, from time to time, attendant to you our said commissioners, and do carefully and diligently observe, execute, and perform all such orders, warrants, and commands, as you our said commissioners, or any three or more of you, shall make, give, and direct, touching the premises, in such manner and sort, as if our High Admiral of Great Britain and Ireland, and of the dominions, islands, and territories thereunto respectively belonging, or of New England, Jamaica, Virginia, Barbadoes, Saint Christopher, Nevis, Mountserrat, Bermudas, and Antigua, in America, and of Guiney, Binny, and Angola, in Africa, and of the islands and dominions thereof, or of any other foreign plantations, dominions, and territories * whatsoever, and places wheresoever [*59] thereunto, or to any of them belonging, had made, given, or directed the same. And to the intent you, our said commissioners, may be the better instructed how to perform this great and weighty

service to our best advantage, and we and our privy council may be the better informed what orders and directions, from time to time, to give therein, our will and pleasure is, and we do hereby of our more especial grace, certain knowledge, and mere motion, give and grant unto you, our said commissioners, or any three or more of you, power and authority, not only by yourselves, but also by any other fit person or persons whom you, or any three or more of you, shall make choice of and appoint, with all convenient speed, to make a true and perfect survey and account of all such ships, pinnaces, and vessels of or belonging to our navy, and of all the munition, tackle, and furniture belonging to them, or any of them, and of all stores, ammunition, and furnitures prepared for them and every of them, of all sorts, and also of all courses now held in managing, order-

[* 60] ing, and governing of our navy, and * to deliver the same, so made and taken, unto us in writing, and to propound such ways and means for the establishing such orders and instructions for regulating the same as shall be found agreeable to our service, and as may increase our power and forces by sea, and remove such corruptions and abuses as may prejudice the same, and especially may reduce the mariners and seamen, and sea service, to better order and obedience than is now found amongst them, that thereupon we may take such speedy and effectual course for the supplying of all defects and reforming of all abuses, as shall be necessary to make and continue our navy serviceable and powerful for our honor, and for the honor and safety of our realms and dominions. And whereas all wrecks of the sea, goods, and ships taken from pirates, and divers droits, rights, duties, and privileges have been, by express words or otherwise; heretofore granted to our said High Admiral, and to former Admirals, for their own benefit, as duties appertaining to the office or place of our High Admiral aforesaid; now our further will and pleasure is, and we do hereby charge and command,

[* 61] * that all casual duties, droits, and profits be taken, collected, and received in all places where they shall happen, by the Vice-Admirals, and other officers of or belonging to the admiralty, in such sort as they formerly were or ought to have been taken, collected, and received by them, and every of them respectively, when there was an High Admiral of Great Britain; and the said Vice-Admirals and others, so taking, collecting, or receiving the same, shall account for the same, and every part thereof, unto or before you our said commissioners, or any three or more of you, or unto such other person or persons, in such manner and form as you, or any three or more of you, shall to that purpose appoint, but to our only use and behoof, and not otherwise. And whereas we conceive it just and reasonable that those who have or shall

truly and faithfully account for what they receive, should have sufficient discharges for the same, our will and pleasure is, and we do therefore by these presents give and grant to you our said commissioners, or any three or more of you, full power and authority to issue forth discharges, releases, and *quietus ests* [* 62] upon such accounts, for all duties, droits, and profits whatsoever, received or to be received by the aforesaid Vice-Admirals, or other collectors, receivers, or any commissioners authorized by the Court of Admiralty to receive any droits or profits of admiralty, or any register or registers, or his or their deputy or deputies exercising the office of register in the High Court of Admiralty itself, or in any other inferior court of the Admiralty, as you our said commissioners, or any three or more of you, shall approve of the said releases, discharges, or *quietus ests*, to be under the hands of you our said commissioners, or any three or more of you, and the seal commonly used by you for things appertaining to the said commission, which we will shall be and remain of record in the High Court of Admiralty, under the custody of the register there, to the end that the parties concerned in such accounts and discharges, may, according to their occasions, (if they desire it,) receive the same exemplified under the great seal of our admiralty. And our further will and pleasure is, and we do hereby declare, that the said releases, discharges, and *quietus ests*, so signed * by you our said commissioners, [* 63] or any three or more of you, and sealed with your seal aforesaid, or the duplicates thereof, recorded in the High Court of Admiralty, shall be held, deemed, and taken, and be a full, sufficient, and lawful discharge, release, and *quietus est* to every such accountant, his executors, or administrators. And whereas, all offices, places, and employments belonging to the navy or admiralty are properly in the trust and disposal of our High Admiral of Great Britain and Ireland, and of the dominions, islands, and territories thereunto respectively belonging, and of our High Admiral of New England, Jamaica, Virginia, Barbadoes, Saint Christopher, Nevis, Mountserrat, Bermudas, and Antigua, in America, and of Guiney, Binny, and Angola, in Africa, and of the islands and dominions thereof, and also of all and singular our other foreign plantations, dominions, and territories whatsoever, and places wheresoever thereunto belonging for the time being; and such High Admirals have constituted Vice-Admirals under them, our will and pleasure now is, and we do hereby of our further especial grace, certain knowledge, * and mere [* 64] motion, declare and grant, that all such offices, places, and employments as shall fall void during the vacancy of the office or place of our High Admiral aforesaid, shall be given and disposed of by you our said commissioners, or any three or more of you; and

you our said commissioners, or any three or more of you, shall and may constitute Vice-Admirals for such places where Vice-Admirals have been usually appointed by our said High Admiral for the time being. Lastly, our will and pleasure is, and we do by these presents grant to you our said commissioners, that these our letters patent, or the exemplification or enrolment thereof, shall be and remain in and by all things good, firm, valid, and effectual in the law, notwithstanding the ill reciting, or not truly or not fully reciting the said former letters patent, or the date thereof, and notwithstanding the not reciting any other letters patent or commission concerning the said office and premises, or any of them, heretofore made or granted by us or any of our ancestors or predecessors, or any other omission, imperfection, defect, matter, cause, or thing what-
 [* 65] soever to the contrary thereof * in any wise notwithstanding. In witness whereof we have caused these our letters to be made patent. Witness ourself at Westminster, the twelfth day of April, in the fifteenth year of our reign.

By writ of privy seal,

YORKE.

GODF. LEE FARRANT, *Registrar.*

[* 66] * *Extracted from the Registry of his Majesty's High Court of Admiralty of England.*

By the Commissioners for executing the office of Lord High Admiral of Great Britain and Ireland, &c.

To JOHN JACKSON, Esq.,

WHEREAS, all wrecks of the sea, goods and ships taken from pirates and enemies, and divers tenths, and other droits, rights, duties, and privileges, which have been heretofore granted to former Lord High Admirals for their own use and benefit, as duties appertaining to the office or place of Lord High Admiral, are, by his Majesty's commission to us, appointed to be taken, collected, and received, in all places where they shall happen, in such sort as they formerly were or ought to have been taken, collected, and received, when there was a Lord High Admiral of England, but for his Majesty's only use and behalf; and,

we having a good account of your experience and integrity,
 [* 67] * in which we very much confide, we do, according to the power granted unto us, constitute and appoint you the said John Jackson, Esq., to be our receiver-general of the revenues arisen,

1 H. & M.

or to arise, by all or any of the rights and perquisites of admiralty, under what denomination soever the same have arisen, or shall or may arise, in the room of Burrington Goldsworthy, Esq., deceased; and we do hereby nominate and constitute you to be our commissioner to ask, demand, recover, and receive, to and for his Majesty's use, all and all manner of rights and perquisites that have been or shall be seized and taken in time of war, or otherwise, and also all other such sums of money as have been usually paid, or shall be ordered by decree of court to be paid into the hands of Godfrey Lee Farrant, Esquire, or the register for the time being; and we do hereby appoint, that all commissions for restitutions, and such decrees and orders as have been formerly directed by the judge of the admiralty, shall, from the date hereof, be directed to you as our commissioner; and we *do hereby appoint you to get duly and justly executed [* 68] all commissions for appraisements, as well of ships and goods rescued,¹ as of ships and goods taken by privateers, and all other ships and goods wherein his Majesty has any rights or perquisites of admiralty, as likewise all commissions for the sale of such ships and goods, as also to have all commissions duly returned into the registry of the High Court of Admiralty; and in the execution of this employment, you are to observe and follow such instructions, orders, and directions, as you shall from time to time receive from us; and we do likewise appoint, that you the said John Jackson shall have the yearly salary of three hundred pounds for your own care and pains in the due execution of this employment, the said salary to commence from the date hereof; and we do hereby empower and direct you to deduct out of the said perquisites, from *time to time, your afore- [* 69] said salary, and to make such an allowance to your clerk as any other your predecessor did; and this our commission is to continue in full force till further order. Given under our hands and the seal of the office of admiralty, this 24th day of January, one thousand seven hundred and seventy-four, in the fourteenth year of his Majesty's reign.

By command of
their Lordships,
PH. STEPHENS.

SANDWICH.
J. BULLER.
PALMERSTON.
C. SPENCER.

GODF. LEE FARRANT, *Registrar.*

¹ When the Lord High Admiral had salvage of all ships rescued by the king's ships, and the crown had tenths of prizes taken by privateers, this clause operated; but since the rights of the King and Lord High Admiral have been granted to the captors, this part of the commission, excepting as to droits, is void.

disposing, or meddling with any ships, vessels, goods, merchandise, or any admiralty droits, and to take such course for the reformation thereof as may best conduce to the bettering and advancing [* 75] the due rights and benefits * of the Lord High Admiral; and you are to acquaint us with any neglects, abuses, corruptions, and encroachments, that either have or that you shall find may be committed by any person whatever, to the prejudice of the office and perquisites of the Lord High Admiral.

10th. You are at all times to have your accounts in a readiness, and to give up the same whenever required by us; and from time to time, to pay such sums of money as shall be remaining in your hands, to such persons as shall be appointed; and you are by yourself or deputy diligently to follow all causes and matters to our Advocate and Procurator-General, as often as there shall be occasion; and you are in general to attend, promote, and prosecute his Majesty's interest in all places and in all causes whatsoever, where either the rights or admiralty jurisdiction are concerned. Given, &c.

[* 76]

* THE WILLIAM AND GRACE.

September 4, 1777.

[Trade with American colonies. Excuse of necessity not admitted.]

A Dutch Jew merchant, who had resided at Surinam and Eustatia, claimed the ship and cargo as his property, which he swore it to be; and among other things set forth, that he had bills due to him, drawn by persons at Philadelphia upon merchants in Holland; that they were returned protested; on which he went to Holland, and gave bail to his creditors, and then went to Philadelphia, where he was obliged to take Congress money, and with that purchased the ship and cargo, and was returning in it to Holland when taken. The ground of his claim was, that this was a trade of necessity, and not such a trade with America as was prohibited by the act. But the court was of opinion, that the act left no discretion to the judges of the admiralty; that all ships and goods, whether Americans or others, going to or coming from the rebellious colonies, after a limited time,

[* 77] were a forfeiture to his * Majesty; that even cargoes remitted to subjects in England and Ireland, after a certain time, were confiscable; and that this Dutch Jew could not expect to be

upon a better footing than British subjects; that no sort of trade was admissible; besides it being against the colonizing laws of all Europe, for foreigners to traffic for and carry away the produce of their colonies; that, in a letter annexed to his affidavit, there was a proof that part of the cargo belonged to some other persons. A distinction was taken between the case determined on the 29th of July last, in favor of a Mr. Baird, a king's officer, who came away with a few casks of indigo for his support, being banished by the pretended government of South Carolina, for refusing to swear allegiance to them, and abjure the king, which was in evidence; as also the case of the Rev. Mr. Angus Macaulay, under the same circumstances; also the case of *The Polly* was noticed, for that was a ship repurchased from the rebels by an English master, who had been taken by them; he loaded her with rice, &c., was in the midst of Hopkins's fleet at Rhode Island, when the king's fleet appeared; he * did not sail up the river with Hopkins, or try to escape; [* 78] and swore he intended, after carrying his cargo to Portugal, in order to save his bail, which he had given at the congress custom-house to carry it thither, and not to any port in Great Britain, to have come home to England; yet the ship and cargo were condemned, because the setting up an intention would be liable, if admitted, to great collusion.

THE FRIENDSHIP.¹

MR. WELLS, late marshal of the Superior Court of Admiralty at Charleston, was a claimant of some indigo. He came away in 1775, being driven from thence by force, because he would not join an association against government, leaving his daughter and family; she left the colony a few months ago, and came on board this ship, having two barrels of indigo for her support, and the ship was bound to Nantz. The court restored the indigo claimed, as also one barrel in favor of a Mr. Millegan, late chief surgeon of the king's garrison in that colony, who was forced away at the same time. This indigo was brought over by his wife. Millegan came over with * government despatches in 1775. The court said, that it [* 79] should be careful how it gave ear to petitions, from which large consequences might follow to defeat the act. Here were two officers of the crown compelled to leave the province; their families

¹ [For other cases where property so shipped was restored, see *post* p. 80-83.]

made part of themselves, and the quantity brought over was very small, and for immediate maintenance of the ladies. It was proved, by the examination, that there were ladies on board; it was reasonable, therefore, to take this case out of the rigor of the law; for as the congress governor permitted British subjects to take away their property with their persons, it would be injustice in friends to rob them of what foes had spared; but all depended upon circumstances, and no one case can be a precedent for another. On the other hand, in the case of *The Belle-Savage*, the court condemned one cask of indigo, claimed by the said Mr. Wells, which was under the care of a passenger, and said to be remitted by some persons not named, his attorneys at Philadelphia, to some persons at Nantz; and in the preparatory examinations, his claim was contradicted by the [* 80] witnesses swearing that * the whole cargo belonged to persons resident in America. The danger of admitting these sort of claims was animadverted upon; as the act might be entirely defeated; and all sorts of people, under one pretence or other, let in to cover the trade of the rebel Americans.

THE COMMERCE.

GOVERNOR BULL, late the king's governor, was claimant of sixteen casks of indigo, which he brought with him; the court restored the indigo. The governor had an estate in the province, and this indigo he swore to be the produce of it. He staid there some time after the congress had deprived him of all authority.

THE BETSEY.

THIS ship was taken by the Americans, and afterwards retaken by a king's ship. It was laden with government stores, and the navy-board contested the demand of Sir James Wallace for an eighth salvage; because the act of parliament only expressed, that salvage should be given to the officers and mariners of any of his [* 81] Majesty's ships * of war, or vessel, or boat, under his Majesty's protection, for ships and goods of his Majesty's subjects retaken from the enemy. It was insisted that the officers of the king's ships, having their pay, it was sufficient, and they did no more than their duty in retaking the king's goods; but the court held, that of common right salvage is always due for recaptures; that it would be very illiberal to construe the act of parliament narrowly, which

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was meant, by the policy of the legislature, to encourage all the king's officers to do their duty, by coupling the principle of interest with the principle of honor; that the pay was not, in most cases of the service, adequate to the risk, danger, and fatigue; that private merchant ships, who never fought but where something was to be gained, would be better off than the king's ships, if the latter were denied salvage; that in Queen Anne's war, The Winchelsea man-of-war being retaken by The Chester, the King's Proctor claimed the recaptured ship, and salvage was decreed to The Chester, in these especial words, "According to law and custom." It was said by the King's Advocate, Dr. * Marriott, that the king's [* 82] stores are the public stores, voted and paid for by the public, of which his Majesty has the application; that salvage had always been allowed, where any thing was recovered from an enemy; and that although the *quantum* of salvage had been floating, as to what the Courts of Admiralty allowed, at different times, before the prize acts of parliament had fixed that *quantum*, yet it was always settled, that recaptors were to be rewarded according to their merit. The case of The Rising States was quoted; a transport ship retaken by a king's ship, and adjudged about a month ago, when the admiralty proctor prayed restitution of the king's stores, paying the salvage; so it seemed singular and reprehensible, that it now should be made a question by the navy board.

* THE SALLY,

[* 83]

Taken by the Letter of Marque Sarah Golborough.

Thursday, October 2, 1777.

THE court restored to the Hon. Edward Savage, Esq., three casks of indigo. He was on board with his son, and had been one of the assistant judges at South Carolina, and was driven away in consequence of his refusing the oath of abjuration of the king and parliament, tendered to him by the New Carolina pretended government, the indigo being sworn to be for his subsistence and not for trade. Restitution was also decreed to Colonel Probart Howarth of four casks of indigo. This gentleman had been commander of Fort Johnstone, appointed by Lord Amherst, and was under the same circumstances with Mr. Edward Savage. The claim of a Mr. Carne

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for seven casks of indigo, and some beeswax, was rejected. It appeared that the oath had never been tendered to him. He [* 84] only set forth his apprehensions, and * it was in evidence that he was to return to Carolina in twelve months. One of his bills of lading he had made out under cover in Colonel Howarth's name, which showed that he thought his adventure might otherwise, if taken, be condemned. He had also left orders for it to be insured for 500*l.* sterling by the Carolina Insuring Company. The claim of the rest of the ship and cargo, by a Mr. William Savage, was rejected. The oath was never tendered to him. He only set forth his intentions and apprehensions of being pressed with the oath; but he had a clearance from the rebel custom-house, and had given security to the congress by one Mr. Baker, resident at Carolina, to perform the voyage to Nantz and back. A foreign seaman swore that he was shipped by the master for that voyage out and home; and farther, Mr. William Savage had insured both ship and goods with the American company for 20,000*l.* currency. His whole family were resident at Charleston. One Thompson, a Scotchman, resident at Charleston, was said by the seaman [* 85] to have been reputed to be a part-owner of the ship. * As it clearly appeared, therefore, that Carne's and Savage's concern was a trading concern, strictly within the prohibitory act, the judge condemned Carne's and Savage's property. The rebel ordinance threatens the king's officers, after their being tendered with the oath, and being gone out of the province, with the charge of treason, and the punishment of death, in case they return; so that Carne and Thompson had it in their power to return, not being officers, and no oath having been tendered to them.

There were claims of the king's officers on board, to whom oaths of abjuration had been tendered by the rebel government at South Carolina, and by two other claimants, who swore they came away under apprehensions.

It was argued by the King's Advocate-General, Dr. Marriott, for the captors, that the question turned on the admissibility of these claims under the prohibitory act. If it stood upon the letter, it was clearly to be answered in the negative; for that it was a general sweeping law, and made no distinctions, except in a few cases and [* 86] circumstances of time and place, none of * which were applicable to these claims. That it was impossible to draw the strict line when the act was made; the spirit of which was to stop the whole of the American trade. That, indeed, some few cases had been since adjudged, in which lenity had been shown to the officers of the crown, in consequence of the American ordinance

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having afforded a ground for some sort of equity and latitude, in regard to the damnatory clause of the act. That if any thing could be found to justify the Court of Admiralty, in taking the liberty of expounding, or rather contravening, the terms of the act, in discriminating the innocent from the guilty, and relieving the numberless unhappy persons suffering for their loyalty, and from their situation, under the general calamity of a civil war, he should see the distinction with pleasure. But the great danger to be guarded against was collusion. A flood of claims and litigation must follow, and the door once opened, it would be like letting out a weight of water, which would run nobody can tell whither. It was therefore necessary that the court should regard such *claims, even [*87] as Mr. Savage's and Mr. Howarth's, with circumspection: although king's officers, they were to be believed only upon their own affidavits of the oath of abjuration being tendered to them, and no other witness proved that fact. Indeed, their properties were small, and they swore it to be for their subsistence. It was not very likely that any of the king's officers would falsify their honor to cover rebel property; yet it was well known, that many, very many of the crown officers who had been appointed in America, were landholders, and had families and connections there. How great soever their public duty was, yet the ties of nature, self-preservation, and interest might get the better. The language is obvious, "If you will preserve my effects, I will cover yours." Colonel Howarth's name is absolutely used by Carne in a bill of lading; whether with the Colonel's knowledge, or without it, does not appear. Whatever the court might think to do with the claims of Howarth and E. Savage, on the ground of the decisions lately in favor of Millegan, Mr. Angus, and Governor Bull's *cases, yet Carne's and Wil- [*88] liam Savage's claim could not be allowed. They were clearly trading concerns, and both insured as such, by a public company of insurers (not of merchants on the Royal Exchange of London) set up by the rebel government, to encourage their trade with other countries, to the prejudice of this; so that the claimants could be no great losers by the sentence of condemnation; and the insurers, inhabitants of the rebel colony, would be the true sufferers; otherwise a restitution of the ship and cargo, in favor of Carne and William Savage, would be, in fact, a restitution to rebels. These two men might return; for by their own affidavits it appeared, that they had taken no oaths, and only set up apprehensions and intentions, a ground not to be admitted: besides, they were contradicted by the ship's papers and preparatory examinations. Without being collaterally supported by them, no affidavit of a party interested can

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establish his claim; it is the rule. William Savage was to return in a twelvemonth, as appears by a letter from one connected [* 89] with his family; a resident * Carolinian was security to the congress for his performance of this voyage, and the seamen were shipped accordingly. A person resident in the colony was also reputed to be a part-owner of the ship. In the case of *The Polly*, a master of one of the king's transports, taken by the rebels, bought his ship again, and having given bond to the congress to return, he set sail with Hopkins's squadron; when they stood away from Sir Peter Parker's fleet, he remained at anchor, and claimed protection, setting up his intentions to have only secured his own property, and to have evaded the enemy; this claim was however rejected. On the whole, the Advocate-General concluded, that if such latitude were to be allowed, the prohibitory act would be defeated completely.

Dr. Bever went over the same ground, and observed, that Carne and W. Savage stayed some months after the publication of the ordinance, and that the fact of the oath not being tendered to Carne and W. Savage only showed that the congress wished to see them again; and that if this sort of proceeding were to be al- [* 90] lowed here, * people might come as spies into this kingdom with safety.

Dr. Harris, Dr. Calvert, and Dr. Wynne, insisted, as counsel for the claimants, that the principle was now established, that notwithstanding the words of the statute, there is a favorable exception for claimants under circumstances. That according to the late decisions, if this ship should be condemned, Carne's and Savage's wives might, on recovering the insurance, safely bring home the insurance-money. That Howarth's and Edward Savage's cases resembled exactly the cases of Governor Bull,¹ Millegan and Angus. That the affidavits, so far as related to their property, were supported by the ship's papers and examinations; and as to their being banished for not taking the oaths, the ordinance proves, that all the king's officers were to be driven out of the province, if they refused the oaths. [It must be observed, that the oath had been tendered to them, and the evidence that they had refused it stood only on the proof of their own affidavit.] There being no standing interrogatory to this case of tendering [* 91] the oath, nothing * of that could come out as to this fact: they had sworn it, and even that is not necessary in some cases; for Millegan, deputy-marshal of the vice-admiralty, had been in England two or three years; his property was brought over by his

¹ [The Commerce, 1 Hay & M. 80.]

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daughter, and was restored: the oath was never tendered to her. Whereas a cask of his on board another ship, bound to France, and by way of remittance, was condemned. The argument drawn from insurance is not fatal to a ship; because, in the last war, ships were not condemned, merely because the insurers were enemies. Yet every French ship almost that was condemned, was the condemnation of the underwriters of the city of London. There were great parliamentary debates about this; and the insurers of each nation reciprocally protected each other's commerce, in spite of the politics of their respective courts. Besides, William Savage proves himself indebted to this country; and Carne's family have been constantly resident here, in Bartlet's Buildings, Holborn: he only went over to collect debts, himself a Middlesex justice, and a trader* only by necessity, from having unfortunately his property in America, which he wished to withdraw. [* 92] The seaman swore only to hearsay about the property of the ship, an Italian, not acquainted with the English language; and the captors were in default not to have examined the master, mate, and other mariners, according to the king's instructions and the regulations of the act of parliament. On these grounds they prayed restitution.

SIR GEORGE HAY, in giving his sentence, said that the act of parliament was the rule to walk by; and the precise line being there drawn, some judges might have thought it for their own ease and justification that they should admit of no exceptions but such limitations only as were expressed in the act; yet, cases had arisen which seemed to call for a humane interpretation of such a general law. The prohibition was clear, that all ships and goods of the inhabitants of the enumerated colonies, declared to be rebellious, and all other ships going to trade and coming from trading there, were to be confiscated; that wherever there is trade, there is confiscation.

* The violent ordinance of the pretended colony government, [* 93] coming after the making the prohibitory act, has now afforded a ground for lenity in certain cases. The king's own officers are all proscribed by the ordinance. But it behoved a court to be very circumspect on the ground taken by the Advocate-General; the great danger of collusions, and the difficulty of knowing where to draw the line; that such officers as Governor Bull could not be supposed to have lent their names for the purposes of screening the property of rebels; and as to other officers, the smallness of the quantity of goods for their support, as well as the quality of the persons, merited consideration; and that he wished the decisions in the late cases, as well as this, to be well understood in the world, that it

might not be wrote over to America, "Only tender your abjuration oaths to the old crown officers, or to persons you may call suspicious, they and their property may go safe to England, and yours too, if they will but swear to it." The judge of the High Court

[*94] of Admiralty will restore." * This must not be. Intentions, apprehensions, will not avail, nor even the oath being tendered, in all cases. Where parties certainly cannot return on pain of death, it differs much from the case of those who can return, and probably will. Carne's and W. Savage's cases are already determined to be trading transactions in the view and object of the statute. They are not governors or officers driven from their establishments, but American inhabitants and merchants, insuring with American inhabitants. Why insure, or why borrow another name, if no consciousness of being liable to condemnation?—and therefore I must condemn them. Perhaps some people may think I have gone too far already, in restoring any thing. I wish to be rightly understood, and I shall be glad to have the assistance of the King's Advocate. In fixing the sense of an act of parliament, open to many new circumstances, arising every day in the course of this uncommon kind of war and rebellion, it is not easy to draw the line between equity and humanity on one side, and strict law and a severity meant to crush the progress of rebellion, and [*95] cruelties, * on the other. If intentions and apprehensions can be admitted on the part of claimants, upon their own oaths, and in their own favor, then the act, prohibiting all trade and intercourse with the American colonies in rebellion, will be a piece of waste paper.

[*96]

* THE HENDRIC AND ALIDA.

A Dutch ship. [bound to St. Eustatia,] laden with powder and guns, with foreign officers, going to the provincial army, taken by the Right Honorable Lord Mulgrave, restored by the court.

The King's Advocate, DOCTOR MARRIOTT :

SIR, — The question is, whether the claims given for the ship and cargo are well proved, as being the property of the persons claiming for themselves and others, subjects of their High Mighnesses? The points which I shall insist upon for the captors are, that, in the present state of the evidence before the court, the ship cannot be restored to the claimants. I do not say it is to be condemned upon

this evidence ; but with submission that the court cannot restore to the claimants, because there is proof from the mate himself, and from the declarations of Rousman, the late master and part-owner, to Count D'Attems, * that the ship was the property of [*97] loyal British subjects, taken off Antigua by an American privateer, and carried into St. Eustatia ; there it was sold, as it is to be supposed, to some persons ; but the transfer of property, either at Eustatia or even in Holland, does not appear by any bill of sale on board. It is a recapture, to the restitution of which a British subject is entitled whensoever the original owner shall appear. It follows, therefore, that the ship must remain in *usum jus habentium*, as a deposit for the party who shall appear finally to be the real owner ; and the claimants must go into farther plea and proof of their property, as claimed according to the directions of the act whenever the court has a doubt.

I think if it should come out that the Dutch claimants have bought the vessel, even for a fair and adequate price, (which is much to be doubted,) yet it would be a great question, whether, by the law of nations, and by treaties subsisting between the two countries, such a transfer is valid. This question is a considerable one ; I shall not go into it till it comes to be agitated. * I shall [*98] only adhere to the proposition with which I set out in the opening, that the ship is not now proved to be Dutch property. I have said, in a former case, that it is necessary to prove strictly transfers of property ; because the position arises out of the nature of this uncommon war and rebellion. Many of our subjects at home, with almost all the other mercantile people in Europe, combine to render abortive the act of legislature for stopping all trade and intercourse with the British American colonies in rebellion. Colorable and pretended sales are the principal means whereby the trade of the colonies is protected. Without strict proof the prohibitory act will be waste paper. In the first stage of the present confusions, this court was lenient ; a very little proof of a transfer was admitted, and it considered the prohibitory act of parliament as made rather *in terrorem*, to bring back the colonies to their duty, than for a rigid execution. You thought, sir, that you did not sit there to consider ships' papers with the strictness of conveyances and title deeds. But the prohibitory act has failed hitherto in the expectation of the framers, * to bring about an early submission, and this con- [*99] test seems to run on *ad internecionem*. It is time, in my humble opinion, that a less gentle doctrine should be adopted. The decisions and forms of law should meet the necessity of the case, and the greatness of the object.

The matters which are to be judged of in every jurisdiction among civilized nations give shape to the forms of proceedings ; it is for this reason I object to the present claim for its uncertainty of personal description. I admit it to be in the forms hitherto used in a lawful war ; but in order to prevent collusive and fraudulent pretensions at this singular crisis, I submit it to the consideration of the court, whether instead of the claim being for A and B, and others, subjects of their High Mightinesses, it ought not to be for A and B, the true and sole owners, &c., &c.

For who are others ? Englishmen, Americans, any persons unknown, settled here and there, for the purpose of carrying on the American commerce, in defiance of every prohibition. Others may

[* 100] be John Hancock and Samuel Adams, if they have * but

Dutch burghers' briefs, according to the ideas of Dutch writers on the law of nations, who have formed it to their own commercial principles, and in derogation to the *jus gentium* of all the rest of the maritime powers, as I shall observe more particularly. But as this observation upon the defect of the claims looks forward to the necessary reform of the practice in the future, rather than to any objection fatal to the present claim, I shall not press the observation farther than to insist, that there arises upon the face of this claim, compared with the evidence in preparatory, a strong internal presumption against its own veracity. Rousman, who came in this ship from Eustatia to Amsterdam, is proved, by Captain Klok himself, to be a third owner of this ship, with Rittenberg & Schimmel of Amsterdam. He does all acts of ownership, and ship's husband ; yet why is his name omitted in the claim of the ship ? Why did so great an interval of time elapse as from the seventh of August, when the ship was taken, and

the fourth of November, when the cause was ready to be

[* 101] heard ? At ten at night, on the third of * November, the agent of the claimants Schimmel & Rittenberg, entered their

claim. Is it not natural to suppose, that Rousman was conscious that he was himself a British-American, and not a true Dutchman, and that his and his partners' title to the ship could not be finally maintained ? otherwise why were they so difficult to be persuaded by their counsel to appear at last, and claim ? and even then Rousman was omitted in the claim. It is easier for claimants to present blustering memorials to the king's ministers, than to advance true facts ; but it is very unjust to complain in a court of justice of delays, which the claimants themselves occasion. When I look at that chair, and recollect how it has been filled in former times, and how it is filled now, I wish the world to know that the rapidity with which causes of prize and forfeiture have been heard in this court is without

an instance in any former wars, not another principal contested cause remaining upon the registrar's books; at the same time the seriousness, the deliberation, and rectitude, I may say, too, the humanity of the decisions, does honor, sir, to that chair, and to a profession * more or less misrepresented frequently elsewhere, in [* 102] proportion as it is little known or regarded.

We were ready to have heard this cause *ex parte* long ago; instead of submitting to a legal proceeding, every way has been tried by the Dutch claimants in another place to obtain restitution. However, they are now at last induced to enter into a discussion of their rights in the proper place.

As I object to the restitution of the ship, so I agree to the restitution of the cargo, so much as is innocent merchandise; and in this perhaps there is very great lenity on the part of the captors, because the consignors and consignees are not proved to be the real owners, and we only except to the swivel guns and powder, and whatever arms and other military stores may be found on board; we pray that the court will decree in the same manner as was done in the late case of *The Twege Broders*, that they shall be sold to his Majesty's government at a fair valuation, by merchants, to be named on each side; and lastly we pray, (what indeed will follow of course,) that just cause of seizure and expenses * may be pronounced [* 103] against the claimants. I know of no situation of responsibility in the public service more disagreeable than that of the officers of the navy, if when according to the best of their ideas, and so far as they can be supposed to understand acts of parliament, treaties, and the *jus gentium*, actuated by the principles of honor and of duty for the service of their country, and in obedience to his Majesty's instructions, they seize ships of any foreign subjects, under the strongest suspicion of being either the property of enemies, or going to their assistance, they are liable, in a court of justice, to heavy expenses, damages and demurrage, as insisted by the claimants to-day. In arguing, therefore, this cause, I cannot do better than to follow what I conceive to have been the ideas of the noble lord, at the time of the capture, upon his detaining this ship, and bringing her in for adjudication. As he is a man of bravery and honor, so he has too much prudence, and too distinguished an understanding, to have detained a ship and cargo belonging, as it is asserted, to the subjects of the Dutch states, if he had not found the * most suspicious circumstances [* 104] of rebel property and hostile intentions towards this country.

There can be very little difference (although the difference was urged in the late case of *The Pandora*) between detaining a ship and bringing her in for adjudication; the latter follows necessarily from

the first. For how can the stopping, searching, or detaining for any time, be justified, but by preserving the justificatory evidence in a judicial way? The appearance of the vessel, her arms and crew, the passengers and powder, together with examinations taken on board by Lord Mulgrave, were reasons to him for seizing and detaining; but he can only be legally justified according to act of parliament by the examinations taken *in præparatorio* and by ships' papers judicially brought in, and which papers every captor is bound by the act of parliament and the king's instructions to send in with their prizes.

The first object which struck the attention of the captor was the built of the ship, confessedly, upon evidence, British-American. [* 105] That the being American built is a reason * at large for seizing and detaining a ship, on that ground merely, we do not contend; but in the present state of American commerce it is a very suspicious circumstance, which justifies the stopping and inquiry. It is very true that American ships are a common object of trade over all Europe, but it is equally true and well known by all persons acquainted with Holland, that the Dutch are the great ship-builders, as well as they are the carriers for the rest of Europe. They build for themselves, and never buy, except the Bermudas built swift sailing sloops to carry on their trade to the Spanish main, and to escape the *guarda costas*. This ship, it is agreed, as one says, is Boston built; another more generally says New England built. But the great suspicion was, that she was armed; and had on board not only powder, guns and naval stores, but five military officers on board; one a Dutch cornet, with commissions doubtless, and despatches but now destroyed. Dutch officer and all going avowedly to serve in the provincial army.

Count d'Attems speaks out like a man of honor, without [* 106] ceremony, and says, that * this vessel had been met with by his Majesty's ship Foudroyant; that the master, Klok, was in a great fright, and told Draveman, another officer, in his hearing, that he (the master) had some papers which he did not choose should be seen; and if Draveman would give him his papers he would conceal them, where neither the seamen nor any one else should find them out.

No such papers were found by Lord Mulgrave, nor the despatches which the master had, and for the taking of which on board, leave appears to have been granted by the Dutch West India Company to the masters and owners.

Here then is a clear proof of spoliation. In this case the *jus gentium* is condemnation; but the lenity of a British Court of Admiralty, in its usage hitherto, has never gone that length; although the Dutch

submitted to it in regard to France, when the Dutch States published themselves in their Gazettes, by their own authority, the famous French Memoire Instructis, of the 8th July, 1756, in which regulations (which the neutral powers were called upon to observe) this, and many other like causes of *condemnation, were [* 107] laid down as the law of nations; and the Dutch States never remonstrated against that famous piece.

But, sir, this ship was an armed ship; and for what purposes it is plain; against this country. The size of the ship deserves animadversion; for, by the Dutch sea-brief, it appears that the vessel was entered at forty-three lasts, that is, about sixty tons: we will, however, admit 100 tons. Fifteen tons of powder is avowedly part of the cargo, about a sixth part of the whole cargo, besides the twenty-one swivels. But this small vessel was mounted with eight carriage guns and four swivels, 100 shot for those guns, and two barrels of powder. Every body who knows the least of shipping must know that such a weight of metal upon deck must render the situation of so small a vessel extremely hazardous in tacking, or in a gale of wind. Here were but four seamen, two boys, the mate, and a master, to twelve pieces of ordnance: who can doubt but they were to have been served by the five officers and their two servants, with Franklin's commission in their pockets? These men, adventurers, who make a trade of war, and are ready to cut throats

*for any side that will employ them, would have made their [* 108] fortunes by a prize of some weak English vessel: but they were unlucky in meeting with such a ship as The Ardent, and with a commander as good as his ship. The very reasons given, by the master and mate, for arming the ship *in this manner, are too ridiculous not to see against whom these arms were intended. To defend themselves against the Turks? they might as well have said, to defend themselves against the Marattas, near the island of Eustatia.

The words of Rittenberg, in his letter to Jan Schimmel, are, "We have mounted our brigantine de Hendric and Alida with six three or four pounders, English cannon, as also sixteen swivel guns; by reason that it being summer time, we are afraid of the Turk. Praise God this day." He does not seem to know the number of guns on board a ship he calls his own, and they are English. The master and evidence fix a larger number. But these guns were also pretended to be for salutes. Seven pieces were to be fired at the castles of St. Eustatia. There is an etiquette about salutes: and Governor De Graaf is famous for his politeness *to rebel [* 109] American vessels; he receives and returns their compliments. I hope, in return, no credit will ever be given in this country

to any papers or documents, with the signature of a man so publicly an enemy of this country. I am sorry that he appears, by some of his letters, to be supported by the Dutch government, in defiance of the representations of ours. One may truly say of him, and the rest of his fraternity at St. Eustatia, purchasers of British ships, they are receivers of stolen goods, knowing them to be stolen.

Although one set of instructions, dated 19th July, orders Captain Klok to salute the fort with seven guns, yet another set, dated 18th July, orders him to be very careful of the gunpowder and cartridges in saluting castles, and not to fire any guns except upon places where it is necessary. It is usual for foreigners to salute forts, and they are complimented in return with much ceremony; but it is not usual for the subjects of the same state to salute their own forts, or to be saluted. Can it be supposed that a Dutchman, in a ship or a fort, would waste an ounce of powder upon a Dutchman? They

[* 110] * are better economists. As to the pass, it is not a true one.

The master is plainly a prevaricator. When examined upon the first set of interrogatories, he swears that he never before took any oath, or deposed that the ship was the property of Dutch owners. Upon the second set of interrogatories, he swears that the pass, or sea-brief, was obtained upon his oath or affirmation.

But the mate speaks out, and says that he signed his name to the passport by the captain's orders, (he does not say whether by Captain Rousman's or Klok's orders,) but that he cannot say whether the said passport or sea-brief was obtained upon the oath or affirmation of the persons therein described, or whether it was delivered to or on behalf of the person or persons who appear to have sworn or affirmed thereto, without their having ever in fact made any such oath or affirmation. This is wonderful! he swears that he signed the sea-brief, and yet does not know the contents, nor upon whose oath it was obtained.

But, on the face of the sea-brief introduced, neither the mate's nor Klok's name is to be found. This is the common trick;

[* 111] * one man swears and signs, and another uses the passports; so that the Dutch collude even against their own government, and defraud it of its duties by taking out false passports and false admeasurements.

In regard to the cargo; here is a very large quantity of powder and swivels; other arms are suspected to be concealed. It is true some Jews appear interested, but it is only in part, and the rest of the powder, as well as the guns, for what appears to the contrary, may be for the account of the congress: unless it can be established that the consignees are the owners: but what is laden to order can-

not be theirs ; it is more likely to be the property of the consigners and laders. But if the cargo is not expressed to be laden on their account and risk, considering the present nature of the commission trade, a further proof of property must be expected, if the claimants will not agree that there was just cause of seizure and expenses against them, for defect of documents. Whatever may have been the rules of admiralty courts, formerly, on this subject, those rules were founded on the state of commerce at that time. The * middle-man, (the factor, the seller, buyer, and lader by [*112] commission,) was not so well known a character as it is now. All business is now transacted by a third man ; and more than three parts out of four of the persons who are styled merchants on the Royal Exchanges of London and Amsterdam, are agents for other men settled on different sides of the water. You see by the letters in this and other causes, so frequently read in this place, how greedy people are after a commission business, even to get it away from one another, because in this species of commerce there is all profit and no risk ; and the same men can contrive to be the buyers and sellers at their own prices, and set the market. No wonder then that all the mercantile people of Europe push for the agency of the American commerce, by commission. There is not one person examined who will swear to the property of the claimants of any part of the cargo ; nor one paper to prove their property, excepting an interest in a share of the powder with the Lobos and Mendez, and a letter of Crommelin and sons to Messrs. Milner and Haynes at St. * Eustatia, that they had shipped, on their account and [*113] risk, goods on board this ship, amounting to Dutch money 22,891 - 15. But this is not so described as to be capable of being distinguished from the rest of the cargo ; and who are Haynes and Milner but Englishmen now at Eustatia, for the occasional purpose of carrying on the American trade, in defiance of the laws of their country, which they would evade if possible ? Who is Donaldson ? Who is Curzon ? Who are the rest of the Eustatia correspondents of the traders in Holland, but upon the same plan of adventurers ?

The only argument we mean to draw from this uncertainty of the general property of the cargo is, that under the declaration of the Dutch West India company, viz., that nothing on board was for the use of the island, and all the crew swearing that none of the powder or guns on board were for the use of the garrisons or fortresses of the States of Holland, a presumption justly arose in the mind of Lord Mulgrave, and must arise in the breast of the court, that this whole cargo had a destination beyond Eustatia, where the ship * only was intended to touch ; for it is clear, [*114]

from the evidence of Draveman, the Dutch military officer, that Captain Roussman, a principal owner, and late master, declared to him, that the vessel was to go on to New England, and there lade with tobacco, rice, and indigo, and then return to Amsterdam. In these cargoes it is universally known the congress make their remittances. And will any body say this is not a contraband trade to his Majesty's colonies, against the law of nations and treaties, whereby all the other maritime powers have shut up the trade of their respective colonies, and endeavored to confine it to themselves? But the Dutch, possessed of a barren rock, and authorized by their directors to take whatever goods they shall find there, avowedly set their faces against this compact of all the other powers. From this place, as a general *entrepôt*, they invade the commerce of France, Spain, England, and Denmark, and are as often condemned as the Spanish *guarda costas* catch them. All that the Dutch States say, is, that

merchants cannot be hindered; they are a set of people in-
 [* 115] dependent of all * the world, and they trade in this way *suo periculo*, at their own risk; and so we say they do now. It will be asserted, that the Dutch have a right to carry what they please to their own island; but it may be answered to that, "the Dutch company certify, that none of the articles on board this ship were for the use of the island." I deny the proposition of right taken in its largest extent, and insist that they cannot aid the king's rebellious American subjects through the medium of their own island. The condition of the island of St. Eustatia is notorious to all the world; and the letters on board this ship, and every other Dutch ship that has been brought in for adjudication, prove the use that is made of the island. Our own merchants, as well as the Dutch, are concerned. The spirit of commercial adventure has seized all the world.

The business of the colonies, and the assistance with arms and ammunition, is not only confined to Dutchmen, Portuguese Jews, and Smouches; all Europe traffics through the medium of St. Eustatia; and its barren rock is become, under the direction of
 [* 116] a governor who is an enemy to this country, * a magazine of arms for enabling the American colonies to support their asserted independence. Spain has vast territories, fortresses, and garrisons. France has very valuable islands; they must have troops and garrisons. The Dutch have a rock, and a castle for salutes; by this they would monopolize the trade of all America, and, though allies of this country, do every thing they can to its ruin. The Dutch West India Company, at this crisis, look with greedy eyes upon all America as their own. Their directors are chiefly members of the States. The Amsterdammers take the lead in the council, and

they are the great manufacturers of gunpowder for all Europe, I may say for the world; yet a true Dutchman must lament this conduct, inconsistent with the true interests of Holland; such a one regarding the permanency of his own state, *vis à vis* all the neighboring powers at home, who can crush it in a moment, must think that the avarice of mercantile adventurers is not to be gratified while the very existence of Holland may be in danger. For whenever Great Britain shall lose her weight in the scale of Europe, Holland must fall.

* It appeared in the case of *The Twegee Broders*, that [* 117] 150 per cent. was made by trading with the British colonies.

Can a nation of merchants resist 150 per cent.? We have already laid before the court the letters which are addressed, under cover, to Russel, to Levinus Clarkson, of Charleston, South Carolina; Chupp & Bourdoin, at Virginia. What need we more to show the course of the trade, where it centres, and the necessity of checking it? But flaming memorials are dictated by American agents, and presented to the States; and his Majesty's officers, of the first character as men of honor, of probity, are charged with having broken bulk. If memorials only stated true facts, they would be duly considered; but let those merchants who deceive their own government, and try to raise the spirit of dissension between two friendly powers, whose great interests are inseparable, look well to their conduct.

This court has power to punish offenders against the king's instructions and the law. I can take upon myself to say that very uncommon care has been taken to prevent an undue rummaging and searching of foreign ships.

* Instructions were never before, in any war, carefully [* 118] drawn and printed for the conduct of his Majesty's commanders, that they might not be led, from ignorance of their duty, into an injury of themselves and others; and it is in the power of every foreigner upon this head to do himself justice.

In this court there is a special interrogatory, the fifth and the first set of additional ones, as follows:—

“Was bulk broken during the voyage in which you were taken, or since the capture of the said ship? and when, and where, and by whom and by whose orders, and for what purpose, and in what manner?”

If this interrogatory were not sufficient, claimants may make affidavits of the fact; but to this interrogatory the master and mate answer, “that bulk was not broken during the voyage in which he was taken, nor after, to his knowledge.”

The answer was the same in the case of the Dutch ship *The Pandora*, which was lately adjudged to be restored.

In the last war there were Dutch masters who pilfered [* 119] themselves, and laid it upon * English cruisers, and Holland echoed with cries of the injustice of our proceedings, as they pretended. Who are the men who dare to circulate, to affirm these falsities at this time of the day ?

For the honor of this court and its practitioners, for the honor of this nation, I wish all the world to know what our proceedings are; they are such as are authorized by the most equitable usage of the law of nations. The principle of condemnation in the Court of Admiralty is in favor of every claimant; it is the language of the divine law of scripture: — “ Out of thine own mouth will I condemn thee, O mine enemy.”

By your own testimony you shall stand or fall; prove your real property, take it, and have it. Yet, if you will sail the seas in a *navire masqué*, in the breach of the peace of the law of nations, and cannot produce upon the first view true unequivocal documents, you shall be stopped; you shall be brought in for a more strict judicial examination; and if you shall be found deficient, as a warning for your future conduct, the seizure and detection will be justified, [* 120] fied, * and you will be condemned in the expenses.

It is on these grounds, therefore, sir, I renew my first motion against the Dutch claimants, to detain the ship for further proof, as there is reason to believe her to be a recapture, the property of his Majesty's own subjects; to restore so much of the cargo as shall appear harmless, ordering the guns, powder, and military stores, if any, to be sold to his Majesty at a fair valuation and appraisement, by commissioners, merchants to be named on both sides, and approved by the court, as was done in the case of *The Two Brothers*, and to decree expenses in favor of the captor, and justify Lord Mulgrave.

Dr. Harris, Advocate for the Admiralty, went over the same ground as the King's Advocate. He insisted that the ship could not at present be restored, but must remain till the property should be clearly made out; that the powder should be ordered to be sold, and consequently the whole cargo unladen under the act of parliament, so

that the contents might be known, and probably the true persons appear. He particularly * observed, that the treaty of [* 121] 1674, which altered the principles of infection, and derogated in all respects from the common usage and law of nations, is now admitted not to extend to the privilege of carrying freely the goods of enemies, in the case of hostilities between Great Britain and her colonies, which could not be an object in view of that treaty; therefore, whenever the subjects of any powers in friendship with Great

Britain now attempt to carry contraband goods, the law of nations reverts to the old footing, previous to the treaty, and the doctrine of contraband infecting the rest of the cargo may take place; to which the exporters make themselves liable by their own act; the only true and effectual way to stop such a commerce, and to punish so much perfidy, being a confiscation without distinction of the cargo, whenever warlike stores are found on board; that all the books of the writers upon the public law of Europe — Dutch, French, Italians, Germans, and others — are all full of the doctrine of infection.

To these arguments on behalf of the captors, it was answered, on the part of the claimants, by *Dr. Calvert*, that the claimants *looked upon their case to be so clear that the court would, [*122] on the first face of the evidence, restore *ex officio*, although no formal claim was made; that Rousman, Rittenberg, and Schimmel, having done acts of ownership, must therefore be presumed to be owners of the ship; besides, it had been sixteen months in their possession; that in many cases, determined since the present troubles, bills of sale had been constantly called for by the advocates for the captors, and as often had it been said by the court that they were not necessary to be produced. He trusted that the determination would be the same again; for that as a bill of sale is the title-deed of a purchaser, so it is natural and prudent that he should keep it in his own possession, and not hazard it on board a ship.

As to the voyage, all that Rousman said was that he was to have gone to New England to bring back tobacco; but it must be supposed that, after Klok was appointed master, his design was changed. But will anybody pretend that this country has a right to stop the commerce of all the rest of Europe, and to say, you shall not buy the goods of our enemies? The subjects of other nations *have a right indirectly to sell arms and gunpowder, which [*123] are merchandise as well as any thing else that is an object of commerce. There was no question of that; that nothing appeared upon the whole face of the evidence that there was any property of the rebels on board this ship, or that any of the cargo was to be delivered for their account.

Dr. Wynne. The claim is objected to, with a view rather to the future practice which is proposed to be reformed, than with any solid objection for the present. It is in the form always usual in former wars. If any other owners, not named in the claim specifically, appear in the evidence, they shall have the benefit as the subjects of a foreign state. The court must not go out of the way on the ideas of reformation. Others in the claim mean Rousman, or any others

who may turn out owners upon a view of the whole evidence; for a master, who is commonly the claimant, or an agent, may not know all the owners; so Klok did not know all the owners of the [* 124] cargo; he could not swear to any of them, for the plainest * reason, because he did not take the command until eight days before he sailed.

As to the delay of giving in the claim not till the night before the cause was ready to be heard, it was indignation; just resentment on the part of the Dutch subjects: they said, What usurpation is this? Are we not to trade to our colonies? It was thought the captors would not dare to make a point of an assertion to the contrary. Consignees and consignors to order, have always in former wars been held to be owners; but here is a clear presumption in favor of Schimelin and the Crommelins, Hopes, and others, Dutch subjects. Domicility has ever been held the rule to regulate the character of citizenship all over the world. It is true, on the first appearance the bills of lading do not mention on whose account and risk; but the gentlemen on the other side have not attended to the letters (which have been since brought in by the claimant, opened.) These letters make so many of the goods as are therein named to be for the account of persons who are Dutch subjects at St. Eustatia. As to the voyage to New England, it is only the hearsay evidence of Draveman.

[* 125] The * crew were too few to man so many guns. Could they, or those who were on board, have hostile intentions? Clearly not.

The ship was built in England; but will the built justify a seizure? If so, we may seize half the ships that swim: for ships are as much an object of trade as any other commodity; the gunpowder is for the account and risk of The Lobos and Mendez. The law of stopping Dutch ships on any account must be denied; for, by treaty, if they do but show their passports, they are not to be detained, much less to be brought in for adjudication, and rummaged to find evidence out of their own papers.

As to St. Eustatia becoming a general mart at this crisis, it cannot be otherwise of necessity. It is a port open for all the world. If you refer to your gazettes, 162 rebel ships have been taken by the king's cruisers; many have been taken by your letters of marque: they and their cargoes must be disposed of somewhere; it is impossible to bring them home. Do you not buy powder of the Dutch in Europe? Do not we use a great deal, and consequently want a great deal in America? It is true, that powder carried

[* 126] to * a market may ultimately get to the rebels; but in the last war an ultimate possible declaration never was a ground

The Hendric & Alida. 1 H. & M.

for condemnation. If you can catch the ship *Jalousia*, and that is loaded, as it is said, with arms for the Americans, take her if you can, and try whether she will not be confiscable.

As to carrying letters or passengers, a foreign ship is not liable to confiscation for that; the owners know not the contents of letters, nor the characters and intentions of mere voyagers. The case of *The Two Brothers* was a case very distinct from this of *The Hendric*. Here the powder is laden by permission of the Dutch West-India Company; there it was laden on board after the ship had cleared out from the quays, and had fallen a great way down the river, and was entered in the ships under the colorable name of merchandise. Here the lading is public, and the gunpowder is expressed in the permit and in the invoice. [Reads a paper, part of the depositions in the cause of *The Twegeé Broders*.]

Bills of sale have never yet been insisted on by the court. In the case of *The Three Sisters*, lately, the argument of the want of a *bill of sale was urged, and rejected. [Reads a paper, [*127] part of the depositions in the cause of *The Three Sisters*.]

Clandestinity and defiance of the Dutch placart was the ground of ordering the powder to be sold in the case of *The Twegeé Broders*. But as to the doctrine of infection, it is too antiquated to be revived, and too dangerous to be put in practice. The master, speaking to Draveman about concealing the papers, when *The Foudroyant* appeared, is only sworn to by D'Attems. Draveman himself swears, that no papers were torn or thrown overboard, concealed or attempted to be concealed. Lastly, the master's denying that he appeared personally, and swore to the pass when it was obtained, is a matter which must arise from his misunderstanding the interrogatory, for his name is to it, and the engagement to observe the rules. And he positively swears, on a second examination, that he did personally appear and take the oath requisite for obtaining the pass. Therefore, on the whole, the captor has been very rash, and ought to be condemned in costs, damages, and demurrages.

The King's Advocate, Dr. Marriott, in reply. Sir, if this [*128] trade is not stopped, it is in vain that we contend with America. We may use the words of the classic,

Tu pulsas : ego baculo tantum.

You hit hard blows; we only (in the schoolboy phrase) send off, and bully. Then it is but too true, that we are at war openly with America, and secretly with all the world besides, to very little purpose.

My learned neighbor has adopted the indignation of a Dutchman. I have heard of indignation making an invective, a poem, or a speech; but I never yet heard of indignation making a claim for a ship and cargo after three months silent acquiescence. I thought a Dutchman had no passions, but that sort of feeling which arises from knowing the difference of profit and loss, and the vexation of being crossed in their mercantile interests. It was not indignation, but contempt for this court, I do not say for this government, that [* 129] made the claimants wait so long before they would * submit to appear judicially. They were advised by somebody to hope for restitution by bullying; but could they reasonably hope for success? When they came to talk with their counsel, they learned a better lesson. "Claim nothing, have nothing; prove every thing, have every thing." Did they expect, sir, that you were to restore nobody knows what, to nobody knows whom? and to hear the whole cause *ex parte*?

As for the pretended acts of ownership, on which so much stress is laid by the counsel for the claimants, they must be denied to be proofs. A man who steals my watch, wears it as his own; he pawns it, or he sells it. These are acts of ownership; do they prove him to be the real owner? and what are these Dutchmen who deal in the purchase of the ships of the king's subjects piratically taken?

"Bills of sale are the title-deeds of the purchasers," said one gentleman; for that very reason, we say, produce them. Plead them, prove them, is the answer.

But, it is said, "the bill of sale is in the custody of the buyer."

Does not every one know, that in mercantile transactions [* 130] and correspondences, there are always duplicates? If places are at a great distance, there are triplicates. Why was not this document on board The Hendric? "They have never been required by the court yet," says the other gentleman. It is high time they should.

It is said, the ship was known by the mate these sixteen months, under no other name than the present. It is not public what arts are used to cover these purchases? Ships are new-named, altered by painting, papers changed, and crews discharged, and the ships sold with rapidity by American captors. In the present confusion of things and persons, the British merchant and loyal subject in America or in Europe, often knows not where his ship is carried, nor in whose hands she is. He himself may be in the power of the rebels: yet, whenever he shall appear, he will be entitled to his property. Time cannot avail against the *jus postliminii*, any more than against the treaty; and more especially when his ship falls again into the possession and is under the protection of the laws of Great Britain in the

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* High Court of Admiralty; the British owner has a right [* 131] to reclaim her as a recapture.

In regard to the voyage, the gentlemen avoid that; because they say Rousman only was to have gone with this ship to New England. If Rousman was to have gone to New England, does it not follow clear that Klok was to do so too, whom Rousman, a third part-owner, appointed master in his own room, but eight days before the ship, being completely laden and armed, sailed from the port of Amsterdam, with a master instructed "to behave as a brave captain ought to do," and to take further orders from Burch and Haynes at St. Eustatia. We deny the whole property of the powder to be proved. The Jews, Foa at Bordeaux, Lobos at Amsterdam, and Mendez at Nantz, are interested in part. For the owners of the rest there is a dead silence.

As to the evidence of hearsay, it is good. The *auditus ex auditu* is the weakest sort. But evidence to a declaration of a master, of an owner, of a party concerned, is an evidence of a fact: and it is conclusive, if it is not controverted; and Count D'Attems, * though a soldier of fortune, is a man of honor, and his [* 132] evidence incontestable.

In regard to the cases mentioned, it is very unfair, in this case, as was done in The Pandora last court by the same gentleman, to bring a scrap of paper out of old briefs into a court in another cause. If this is allowed, we must read the whole context, and all the evidence in those causes; fight all our battles over again; and so we may talk down that clock. But if my memory will serve me, in The Twegee Broders, although some part of the powder was put on board clandestinely, yet the general cargo, and a very great part of the powder and arms especially, were entered and cleared out as merchandise, at the West India Company's quays and at the custom-house; and part of the powder was put on board when the ship was in the stream of the river, the rest when she was fallen a great way down: I am sure that was the evidence. The Dutch placart is very artfully worded, and calculated for evasions, and being made only for a year, and not being renewed for an interim of two months, the Dutch, at the time of lading The Twegee Broders, seized the opening for their trade, * and lost no time to supply the [* 133] call for powder and arms in America.

The Admiralty single passport, No. 1, is the common passport which grants no special permission for the powder.

The bill of lading for this powder, No. 10, is only made out in the name of merchandise; and so are the freight lists, No. 5, signed

by the West India Company's clerk, upon which the permit was afterwards obtained, and the word powder foisted in.

As to reasonings taken from cases in the last war, gentlemen who delight in being case-mongers, and string their precedents as boys do birds' eggs, (and we all know that for an argument's sake, one bad precedent is as useful as a good one,) may go burn their memorandums. The case of the Dutch was very different trading with the subjects of France and Spain, and now with the king's rebel subjects. They were upon an equal footing of friendship with France and Spain as with Great Britain. France and Spain were acknowledged friendly powers by the Dutch, and had a right to trade indirectly with them; though even then they were condemned when adopted [* 134] by special license * and a direct trade. But will the Dutch say, "the Americans are as much our friends and allies as Great Britain? They are independent; they are like ourselves; they mean to form themselves on our model; and we will take them under our protection." Let words speak out, or let facts, stronger than words, announce the doctrine; this country will not bear it. It will have indignation, too. *

We refer to treaties, to prove, in case of either party purchasing the prizes taken from the other, that the prize, although *bonâ fide* bought, shall be restored to the true owners. Reads the article :

Article XX. Treaty of Bredah, 1667. The King of Great Britain and the said States General shall not receive into their ports, cities, and towns, or suffer that any of the subjects of either party do receive any pirates or sea-rovers, or afford them any entertainment, assistance, or provisions; but shall endeavor that all such pirates and sea-rovers, and their piratical accomplices, sharers, and abettors, be found out and apprehended, and that they suffer condign punishment [* 135] for a terror to others; and all * ships, goods, and commodities, piratically taken by them, and brought into the ports of either party which can be found, even although they are sold, shall be restored to the right owners, or satisfaction shall be given.

Is there not an indirect assistance given to the open and declared rebellious enemies of Great Britain? yet what says the treaty?

Article of the treaty of Westminster, Feb. ⁹/₁₃, 1673-4. Neither of the parties shall give, or consent, that any of their subjects or inhabitants shall give any aid, favor, or counsel, directly or indirectly, by land or by sea, or on the fresh waters, nor shall furnish nor consent that the subjects and inhabitants of their dominions and countries shall furnish any ships, soldiers, mariners, provisions, money, instruments of war, gunpowder, or for any things necessary for war, to the enemies of the other party of any rank or condition whatever.

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And as to the ordering cargoes to be sold for the service of the state, in cases of extraordinary necessity, that is clear from another article.

* Article XXVI. Treaty of Bredah. Merchants, masters, [* 136] and mariners, of either party, or their ships, goods, wares, or merchandises, shall not be arrested or detained in the lands, ports, roads, or rivers of the other, to serve in war, or for any other service, unless upon an extraordinary necessity, and then just satisfaction shall be made. This shall be no prohibition or hindrance of any embargoes or arrests duly made, and in the ordinary course, according to the laws of either country.

Will any body say that this extraordinary necessity does not exist at this crisis; or that just satisfaction will not be made to the claimants, by paying them a good price for bad gunpowder? for such was the last said to be, which was sold to the Board of Ordnance by order of the court, in the case of The Two Brothers.

As the gentlemen are fond of quoting; in the last war we all remember how naval stores were ordered by act of parliament to be sold for the use of government; nobody talked of treaties against it.

The king's government do not wish to injure Dutch owners, if such there are, but * only to insure the military part [* 137] of the cargo not going to the American rebels for their supply in the very heat and midst of a campaign.

The lenity of the same decree again, (as in the case of The Two Brothers,) will bring all the Dutch gunpowder to a British market, and indemnify the Dutch owners by a high price, and the hurt of our own manufacture. In regard to claims, as well as transfers, I repeat again, they cannot be too specific to avoid collusions; and every jurisdiction must adopt new forms from time to time, as every country in the state of human affairs and commerce takes a new face, and as fresh objects arise for the control of the legislative or executive powers.

SIR GEORGE HAY. It would be too high for any such court of justice as this, to assert that the Dutch may not carry in their own ships to their own colonies and settlements every thing they please, whether arms or ammunition, or any other species of merchandise, provided they do it with the permission of their own laws; and if they act contrary to them, I am no judge of the * laws of [* 138] Holland. I cannot enforce them; but their last placart permits such exportation, with the permission of the College of Admiralty.

I cannot judge politically, nor have I any discretionary power but on legal grounds.

The king's ministers must treat with the Dutch states, and enter into a negotiation on this subject.

The treaties with foreign powers are best known and understood by his majesty's privy council; and his Majesty has power to make further rules for proceedings in his courts of admiralty; a representation must be made by persons of much more consequence than I am; and when a notice comes to me from the council, I will obey it.

What the Dutch would do, I will do as far as I can. The Dutch placart, in cases of exporting without permission of the College of Admiralty, under which the loading is to be made, subjects to confiscation and fine foreign and Dutch ships; and when the Dutch have a permit, then say they, we will carry what we can.

[* 139] * Under these permits, I cannot prevent. The gunpowder cannot be proved to be going directly for the use of the rebels. In regard to the ship it is claimed, as to the form of the claim hitherto usual, properly enough; and the ship has been in possession of the Dutch claimants sixteen months, as sworn to by the mate. The master could not give much account of the owners of the ship and cargo, as he took the command but eight days before she sailed. Every presumption arises in point of law from possession and acts of ownership.

But the condition of the ship, being armed, and having officers going to the provincial army, is a great point against the claimants for costs, and must have struck Lord Mulgrave. If it was clear that she was going to New England, touching at St. Eustatia, that would never do. All ships trading thither are confiscable; and the act of parliament is notice to all the world, and so was the former act, in the case of naval stores. The declaration of Rousman, the former master,

and part owner, as to this illicit destination, is well proved; [* 140] and the strong suspicions arising * from that, and the armed state of the ship, and the character of the passengers, are all circumstances that concur fully to justify the seizure. Lord Mulgrave did his duty to stop this ship, and bring her in. I cannot direct any part of this cargo to be sold. In the case of The Twegee Broders, there was clandestinity in lading the powder; besides, there the agent consented to a sale of the powder and arms. I restore, therefore, the ship and cargo, and decree just cause of seizure and expenses in favor of the captor. A representation must be made by some proper person to government as to cargoes of this sort.

The Vrow Antoinette. 1 H. & M.

* THE PERE ADAM.

[* 141]

November 13, 1778.

SIR JAMES MARRIOTT, JUDGE.

A CLAIM was given for a Frenchman, owner of this ship, seized before the declaration of reprisals; the court rejected the claim, because a commission of general reprisals is stronger than even a declaration of war, authorizing to seize the goods of the foreign subjects every where, and immediately; whereas by treaty, in case of declaration of war, there are six months allowed to remove their persons and properties; besides this, the king of France publicly declared, on the 10th of June last, hostilities against England, so that the claimant had no *persona standi in judicio*, or no civil right to plead¹; the two countries being engaged in an actual war.

THE YONGE HELENA,

A Dutch ship, was restored, having French goods on board, laden before declaration for reprisals, bound from one port of France to another. The cargo, * being an innocent cargo of oil and [* 142] soap, was also restored; but as the ship had no Dutch passport, and the master swore that his own bill of lading was false, the captor, the commander of his Majesty's cutter The Kite, was declared justified in stopping her; but each party to pay their own costs, the goods being privileged by treaty.

THE VROW ANTOINETTE,

A general carrier, with goods on board, laden by various persons at Hamburg, consigned to Frenchmen at Bordeaux; but the bills of lading for the most part not specifying on whose real account and risk the goods were laden, and the carrier master very honestly not undertaking to swear to the real owners, the court ordered that the

¹ [As to suits by alien enemies, see *The Rebecca*, 5 C. Rob. 102; *The Charlotte*, 1 Dod. 214; *The Eliza Ann*, 1 Dod. 245; Seamen (enemies) who sail in a licensed ship may sue for their wages, *The Frederick*, 1 Dod. 266; *The Maria Theresa*, 1 Dod. 303.

claimants should specify the real owners, and that the several parts of the cargo, which were planks, hemp, sail-cloth, and sheets of copper for sheathing ships, should be sold for his Majesty's use, to persons to be authorized, on a fair valuation by merchants; the carrier to be paid his freightage, and all incidental charges, by the buyer; [* 143] * and the money to be paid to the claimant or captor, whosoever should finally have the property.

THE LOUISA.¹

A case of a very singular kind. She was taken by Captain Winter, commander of a Jersey privateer. It appeared by the evidence of Macurdy the master, and himself a part-owner, that he, imagining Captain Winter to be an American, produced from under his stock a passport and certificate signed by Franklin, Deane, and Lee, the American agents at Paris, certifying that he, Macurdy, was the master, and Joshua Johnson, Esq., an owner; that the ship was cleared out from London in ballast, intended for Portugal, there to take salt, jesuits bark, &c., for the United States; that the English papers were only color, and that the American cruisers were to let them pass. This ship and her stores were claimed by Matthew Ridley, Esq., of London, merchant, for himself and his partner Joshua Johnson, and for Macurdy. All the papers were fair, and letters addressed to [* 144] his correspondents at St. Ubes and New * York, and made as if the ship was to carry salt for New York, or the headquarters; and the American passport was antedated a few months before Macurdy swore that he and the other bought the ship, which was a prize-ship sold at Jamaica; but he swore that Johnson gave him up the passport, and one Mr. Williams procured it. Johnson is out of the kingdom; Macurdy was a British born subject, but had resided a good while in America. There was another man on board, who declared himself a subject of the American States. The claimant not only demanded his ship, but costs; and the King's Advocate, Dr. Wynne, argued very strongly for the claimant, that it was a fraud put on the Americans; that the Americans had a shop here for passports in blanks, to sell for the benefit of the commissioners; and it was fair to buy of them protections; that it did not appear the ship was to go to the rebels. Dr. Harris on the other side contended, that though it did not appear, that Mr. Ridley was conusant of the fraud

¹ [See note to *The Hoop*, 1 C. Rob. 198.]

of his own country, yet he was affected by the act of his two partners ; that the ship must be considered as an adopted rebel ship ; * that the transaction was treasonable, and costs should [* 145] be given, although it is not usual in general to give costs againsts the claimants, where a ship is condemned ; as condemnation is held punishment enough, although the prize-acts require the claimant to give security for double costs ; which is usually in 60%, the single costs being but 30%.

The Judge [Sir James Marriot] declared the ship and stores to be condemned as rebel. He made very strong remarks on the conduct of merchants and others supporting the American rebellion from the very centre of this country, and on the offices and correspondence carried on by rebel agents. That this nation (now fighting for its domestic preservation, as well as empire) had its cruelest enemies within its own bowels ; that he would not be bound by the act in regard to costs. The American prohibitory act regulated, like other prize-acts, the modes of proceeding, but did not take away the general powers of the court ; that the act required bail for double costs from claimants ; but there were other costs besides those upon bail. He would not * condemn the claimants upon their bail, but [* 146] he would condemn them in treble costs generally, *ex officio*, and as much as the proctors could swear to ; that it was his duty to do as much justice as he could to the whole kingdom in this instance, in putting a check to every sort of support and encouragement from home of a system involving the ruin of all good men's lives and properties ; a system treasonable and traitorous. That here was a clear fact proved from the evidence of the guilty party, of aiding, abetting, and having intercourse with the self-established and declared enemies of the king and nation ; and he only wished his court had a longer arm to reach such a sort of treason ; that if Mr. Macurdy, Mr. Johnson, and Mr. Ridley, were dissatisfied with the decree, they might appeal if they dared.

* THE GRUEL.

[* 147]

November 23, 1778.

AN English transport, taken by the Americans, and fitted out by the congress, and laden with masts and yards, and bound to France: the masts and yards were claimed by John Durand, Esq., as con-

tractor with government for selling trees fit for masts in the province of Massachusetts Bay, and as proprietor of the same; and it was endeavored to prove, that these masts were felled by his agent, and deposited in his agent's mast-dock, the only one at Sheepscut, upon Kennebec river, and there seized by the rebels, and laden on board this ship. But it appearing that the congress had had possession of this dock for two years, from 1775 until 1777, when the masts were put on board; that the name of the claimant was not upon them, but that of the congress' agent; and that the masts on board were thicker in diameter, and shorter in length, than the masts claimed in the schedule; and that the agent reducing his claim from fifty-
 [* 148] three masts, which * were on board, to nine, showed plainly
 • that many other masts were felled by private proprietors, or by the congress, and were actually on board; the court rejected the claim, upon the face of the claimant's own evidence, as not identified; and remarked on the danger of collusion, if such sort of claims were admitted. The ship was restored to the commissioners of the navy (paying salvage) they appearing to have paid the value of her to the original owners.

DE JONGE JOSLERS, Reetsma.

A Dutch ship, bound to France, cargo iron, hemp, and sail-cloth; the naval stores were ordered to be sold to the commissioners of the navy, for his Majesty's use, on a fair valuation by merchants; the buyer to pay the incidental charges, so that the privateer might be at no expenses; the money to be paid into court, for the use of such persons who should hereafter prove their property. As the master would not swear that the loaders were the owners, and it appeared that the consignees were Frenchmen; and as no claim was given, either for ship or goods, the ship was decreed to be restored
 [* 149] * to the owners, whensoever they, or their agents, should claim, and make the usual affidavits of their property.

It was observed by the court, that there was something very mysterious in the conduct of the Dutch captain, who refused to claim; that it called to mind the refusal of the French supercargo, in the case of *The Koulikan*; that it was well known there are many people very busy to blow up a quarrel between us and Holland; that this conduct was a contempt of jurisdiction not to be borne in any Court of Admiralty in the world; that it was a dereliction of the interest of the owners, for whom every master is a trustee, and at the same time a weakening of all the rest of the evidence in their favor;

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for one can hardly believe that cargo any man's real and sole property, which he or his agent refuses to claim, and swear to. That a court can supply the defection of a master, *ex officio*, and will do so, when owners are at a great distance, so as to know nothing of the capture, and when a master may have colluded and deserted them; that here the Dutch owners had time enough to know; the capture having * been made the 13th of October. That if [* 150] there was any latent meaning in all this singular kind of stubbornness, it would lose its effect; for the consequence of any neutral refusing contumaciously, after a monition to appear and claim, is a certainty to obtain no costs or damages. That a French Admiralty Court would have condemned such a ship, for want of a claim, without ceremony.

THE JEANNE JEAN VANDERLEYE,

A DUTCH ship, with French innocent goods on board, bound from Nantz to Ostend, was restored by consent, the captor engaging to pay all the expenses on his part, which are the most considerable, unless the claimant shall insist on costs; which question is reserved for the claimant to declare.

THE SANTA REIS, Majos Roderigo Vidal, master.

A PORTUGUESE ship and cargo, French property on board, was restored, as privileged, and the privateer is to pay costs and damages, by consent.

* ANNA CHRISTIANA.

[* 151]

A SWEDISH ship, restored; British merchants, claimants, assigned to prove their property of the cargo, being houses in London, trading to France; the bills of lading all false made out, as if at Ostend for Nantz, with steel ware and India goods, copperas, and pimento. Laden before the declaration of reprisals. The bills of lading did not specify for whose account and risk; made out in false names as laders living at Ostend; and the master swore, that he believed the consignees (who were all Frenchmen at Nantz) to be the owners, and that the goods were for their account; and that the bills signed by him were false; and that he had destroyed his clearances when he sailed

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out of the river Thames. The claimants did not all of them say in their affidavits, that they should be the only losers in case of condemnation, and others only claiming for themselves and co-partners, without specifying those partners, and where they reside. The court said, that although the claims of masters of foreign carrier ships, [* 152] taking in goods upon general * freight, might be admitted in a general way, not knowing the owners, yet the collusions practised here with the rebels and natural enemies of this country were so notorious, that specific claims must be required now of all British subjects claiming any goods on board neutral ships destined for the enemies' ports. That on the other hand, some tenderness was due to merchants lading their property before reprisals were declared; and therefore the question of the cargo to whom belonging, and when laden, should be reserved until the next court for further consideration.

THE JOHN.

An English ship, retaken from the French by a privateer, and having been in possession of the enemy near ninety-six hours, although not carried into any port; a question was made, whether, there being no act of Parliament to regulate the proceeding in cases of French captures and recaptures, the old rules should not be observed in favor of privateers retaking, to give a salvage according to the time in the possession of the enemy. That larger salvage has always [* 153] been allowed to * the privateers than to the King's ships, in all former acts, until the American act, which now equally confined both to one eighth salvage. That it must have been a slip in the legislature, in the American act; as the King's ships are doing their duty, fitted out at the public expense, but privateers at the extraordinary expenses of particulars.

The court said, that whether it was a slip or not, in the drawers of the American acts, yet it would be very awkward to have two different rules; one for American, another for French, recaptures. That as in this case the court was not bound by the acts in former wars, which expired with them, so it was not bound in this case of French reprisals, by the American act of letters of marque. That the divisions of point of time for more or less salvage, was always a bad rule, borrowed from the oldest Dutch placarts, and seemed calculated for increasing litigations and disputes. The simplest rule was the best in every thing, and that the decision in French cases of recapture should square with the clause in the American act; therefore pronounced for an eighth salvage, yet not so as to preclude the discretion

The Le Grand Terrein. 1 H. & M.

* of the court to give a greater, and even a very great [* 154] salvage, in other cases, where there should be very great merit in retaking.

There was no resistance in this case on the part of the enemy; but when the action should be attended with loss of lives and blood, and damage of recaptors, they might expect a proportionable salvage; observing that this country owed much at this time to the activity of private armaments; and while privateers observed strictly the law, and the King's instructions, in doing no injury to British or neutral innocent subjects, they would meet with every suitable and just encouragement.

* LE GRAND TERREIN.

[* 155]

November 27, 1778.

[Capture by a private vessel which had petitioned for a letter of marque, and which obtained it the next day. Held to be a droit of admiralty.]

A FRENCH ship, taken by The Tartar privateer on the 9th of August. This ship appeared to have sailed from Martinico with a cargo of cotton, rice, indigo, and tobacco; and it came out in evidence that the cotton, rice, and indigo were laden on board on French account. The tobacco was not expressed in the other bills of lading, but mention was made of sugar and coffee. The master swore that this tobacco was put on board by Serres and Sargetson, at Martinico; but he would not undertake to swear who were the true owners and consignees; and that the reason of substituting the words sugar and coffee in the bills, was, that the laders were afraid it would be seized by the English, because it was the produce of North America.

The captors prayed the court to condemn the prize to them, on the ground that they had a commission of marque to seize American property, and that this tobacco *might turn out [* 156] to be so, upon further proof being allowed; that they had petitioned the Lords of the Admiralty for a letter of marque against France, on the 5th of August, the day before the ship was taken; kept possession of the vessel (which was carried first into Torbay, and afterwards to Jersey) after the date of the commission being actually granted; that the French ship fired first, although not knowing of hostilities, as an American enemy would have done, and that there was an engagement of half an hour.

This being opposed by the *Advocate* and *Proctor* for the Lords of the Admiralty, it was contended that, the ship and goods being French, and taken by a ship not in possession of an authority to cruise against the French, the same were droits of the crown in the office of admiralty, and that the takers must lay their petition, and state the circumstances of the capture to the crown, in the usual manner, who would then (as had been done in all similar cases, before the act for granting letters of marque against the Americans) refer the petition to the judge, to reward them in such proportion as they should appear to merit.

[*157] * The COURT [SIR JAMES MARRIOT] gave its opinion that the collector of admiralty droits was right in this case; that to suppose a ship well commissioned, merely because the fitters have petitioned for it, although they have not obtained it, would be a doctrine attended with dangerous consequences to the national honor and public service; that there is no act of parliament now in being in the case of the French hostilities, to oblige the Board of Admiralty to grant letters of marque upon petition of any parties. The policy of that obligation was not to be admired in former prize acts; and it is better there should be a discretionary power left in the Admiralty Board, considering the times; for very improper persons may apply, commissions may be wanted by smugglers and rebels; and there is too much reason to fear that some such have obtained them. Every thing is become full of collusion; and traders with our enemies may be armed, and commit piracy and depredation on all the world, with dishonor and danger to this country. The king's declaration for giving the prizes to the captors is far from support-

[*158] ing the proposition of the advocates of the captors, *that a petition is a commission by intendment, or so to be understood; for the king's declaration sets forth, first, "the inherent right of the crown in all prizes;" and then that "prizes taken by ships, having letters of marque, may be sold and disposed of by the merchants, owners, and fitters, and others to whom such letters of marque are granted, for their own use and benefit, after final adjudication, and not before." There is no retrospect in the king's declaration for private ships; but there is for the officers of the navy, they being already commissioned, who are "to have the neat produce of all prizes which are or shall be taken." The argument of the tobacco being possibly American property does not alter the case; it would do the captors no good for the court to order the parties to go into farther pleadings and proof of the tobacco, which, besides, made only a part of the cargo. The argument drawn from possession, after the grant-

La Bonne Amitie. 1 H. & M.

ing the commission, is not in favor of the captors; for the property of prizes vests or not at the time of taking. The holding on that which is another's acquires no right; and the carrying away * from Torbay to Jersey did not help the captor's claim, but [* 159] otherwise; for prizes, being once brought into any safe port of his Majesty's dominions, are there to be kept, and not shifted about, unless in case of necessity. In regard to encouragement, that was a matter of petition and reference. The court (under a former judge) had rewarded amply, two clear thirds to uncommissioned captors; but more might and would be given by the court, under circumstances of greater merit, as in cases of fighting, and extraordinary bravery. The court will adhere to no one general precedent, but all the king's true subjects, who shall engage the actual enemy, although without commission, shall be amply rewarded; and it is, therefore, only now a contention, not on the part of the Board of Admiralty, tending (as was said) to discourage the public service, but a struggle of the agent of the privateer, attacking the collector of admiralty droits, who shall have the agency. The captors seem to go out of the way to get that which they might have in the common road, at a less expense. The court, therefore, pronounced that the ship and cargo be * condemned as a droit of admiralty. [* 160] The proctor, however, declared he appealed from this sentence as a grievance.

LA BONNE AMITIE,

TAKEN the 11th of August, by The Speedwell and Swallow privateers, being under the same circumstances, excepting that the whole cargo was French produce, the court made the same decree. The proctor, however, did not appeal — only prayed that the court would decree the captors to be rewarded immediately, or that the captor's right to salvage might be reserved.

The JUDGE [SIR JAMES MARRIOT] said that he could not take upon himself to grant away the droits, which are a public right acquired to the crown, till he was authorized by a reference from it. Whenever it came, the captors would have reason to be satisfied. He was sorry whenever they were absurd or ill advised; and as to the right of salvage, it is a right of common maritime law in all cases of ships retaken, and should be reserved (if prayed) so as that, in case the crown should not grant the prize, (which never could be doubted, and he wondered * to hear it doubted now,) the [* 161] captors might come into court and insist upon salvage.

ANNA CHRISTIANA,

A SWEDISH ship, (a general carrier,) bound from London to Nantz, with false bills of lading for Ostend. The ship was restored to the Swedish claimants the last court, but the question as to the cargo reserved for consideration. Ordered, that the claimants of the cargo (British merchants) shall prove (from the custom-house books) the date and contents of the clearance, which the master swore he destroyed as soon as he got out of the river; also the date of the day on which the ship took her departure from Gravesend; whether before or after the king's declaration of reprisals; and that the five claimants, (French houses in London,) Messrs. Reboule, Thelusson, Holtot, Jacquery, and Haman, shall prove their property. The parties assigned to prove are, at all events, to pay all the expenses of proceedings, as their own false documents, defective bills of lading, and the destruction of their clearance, were the occasion, and [* 162] are a justification of the captors' * seizing the vessel, which appeared never to have touched even at Ostend, for which place it was cleared out; that the reason of putting in the name of an Ostender, Mr. Hoys, in the bills of lading, and the colorable covering which was given by the claimants, (namely, that it was in order to introduce English East India goods, pimento and steel, into France, which could only be admitted, by the laws of France, as from a neutral port,) may be a true or false reason, but the court cannot enter into it. The claim of Thelusson is not specific. It is for self and copartners; but it does not say who those partners are, and in what country they reside; and the cargo would have been condemned in France clearly, if it were not on French account; so that it is highly necessary to show that the claimants laded not only on their own account, but real and sole risk. It is observable that the master has sworn that he was hired by a broker, but he does not know who. The connections of merchants, as insurers, actual or employed partners, having joint concerns and accounts, are such, in [* 163] the commercial world, that this * court will find it very difficult to prevent the avowed enemies of Great Britain receiving assistance from her own subjects; for the spirit of commerce, in all countries, rising beyond a certain degree, absorbs all public duties and spirit, and almost every moral and natural obligation. All nations are alike in this, as they are more or less corrupted by commerce and riches. Merchants resident in England must plead as well as prove their property, if the captors insist upon it; otherwise affidavits may be admitted by consent. The captors have a right to plead con-

La Prosperité, or Welfaren. 1 H. & M.

trary, and to cross-examine; and the great object of the court will be to reach the least treachery or collusion of British subjects, with as long an arm as it can.

In regard to the freight due to the Swede, the court will allow all neutral carriers their full freightage, even as to the farther port of destination. That is their right, and a charge hypothecated on the goods of enemies, of which they should have the full benefit, provided masters of neutral ships are guilty of no falsities or prevarications in their evidence or conduct. The *party to [* 164] to pay the freight will be the party to whom the goods shall be adjudged, and demurrage will be considered in some special cases.

LA PROSPERITÉ, OR WELFAREN,

A SHIP claimed by the master, for the inhabitants of Lubec, (one of the free imperial cities of Germany,) who also claimed the cargo generally, on behalf of the several persons who should appear to have interest therein: bound from Nantz to Dunkirk: taken by the Tyger privateer; had a French pass and cocquet. Claims were given for Martinus Tak, a Fleming resident in Flanders, and Dutil, a Dutchman, resident at Amsterdam; the first for ten bales of handkerchiefs. The laders were French; and the bills said they were for Tak's account, but not risk; and the brandy claimed by Dutil was expressed in the same equivocal defective manner.

There were also goods, coffee, and cotton-wool, entered for the account of one Rocha, who did not claim at all: and it was three months after the capture, on the 25th of August, before Mr. Amsinck, (a merchant * in London, and agent for Tak and [* 165] Dutil,) entered a claim for their goods. The court restored the ship to the Lubecker, and directed the claimants to verify the bills of lading, observing that the master swore that he did not know the owners; that he believed the brandy was French, and referred to the bills of lading. It was suggested to the court, that an order should be made to prevent claims being given in this general way, on behalf of the several persons who shall appear to have interest, that is to say, persons unknown; for that it gave the master and agents a right to inspect all the papers, and then to set up and introduce fresh claims, (as Mr. Amsinck had done,) at a distance of time, and to adapt them so as to support the defective titles on board.

The judge [SIR JAMES MARRIOT] said, he had no doubt but claims should be as specific as the nature of things would admit: that claims for British subjects, as he had already said, should be very

specific; he would settle the official form with the registrar; and if he had any doubts, he should ask and have the advice of [*166] all the advocates, and * most able and respectable practitioners, to settle a form, if any real doubt should arise. That it was much easier to see an inconvenience, in all modes of human society, than to find a remedy, which may not, on trial, produce a greater evil. That the established practice of courts was not to be altered, without great danger. It led, sometimes, to injure general justice, by endeavoring to do a particular one. It was true, that by the ancient rules of admiralty, as observed by the King's Advocate, all the separate parcels of goods were specified in claims, and the parties themselves were required to claim personally. But that practice, whatever it had been here formerly, and whatever it may be in the French, or other foreign Admiralty Courts, at this day, was changed in the late war, with great justice, in favor of neutral general carriers, upon freight; who have it not in their power to specify, otherwise than by referring to their bills of lading; and cannot therefore be full in their affidavits annexed to their claims of cargoes, but which must be for persons generally, who shall appear to have interest.

[*167] * Affidavits annexed to claims are, in all cases, only the vehicles of claims, to bring the parties interested into court. It is the master's duty to claim for them, till they can come and claim specifically for themselves.

As to his obtaining the advantage of seeing the papers and depositions, the master could see nothing but what he had seen before; so no great danger from that: and as to honest neutrals, the judge said, he would be the last man to alter any practice now established, which might give them a fair running in the course of a cause. That whenever the scales were even, a neutral was to have the turn in his favor; for that this court was to judge uprightly between this nation and all others; and it must lean, for the honor of English justice (as well as bravery) against every possible charge or suspicion of any selfish national prejudice. He would not therefore shut the office against neutral general carriers: they are in the case of all common-carriers at land, who can only tell, from their entry-books, what persons delivered goods to be loaded, and from the directions

[*168] on the parcels to * whom they are to be delivered on arrival.

But when parties themselves come to claim, then it is reasonable that they should swear that they shall be losers *in solido*, that is, solely and wholly, and that the cargo was and is for their entire account and risk from the beginning; that it would have been so, if the cargo had been, or were to be delivered at the port of desti-

nation ; and not only they must swear affirmatively to their property, but negatively, that none of the king's enemies have, or will have, any property or interest in the same, in case it shall be restored, or arrive at its destined port ; and, in short, that the 12th article of the standing interrogatories will be a good model for the claims. That if deficient claims shall be brought by any, and particularly by any British subjects, the registrar shall, on their bringing them to the office, refer himself to the judge, who would be ready to hear any objections upon them. That if it was once understood in France, that slight claims, and bills of lading, merely on account, or consignments to order, or to bearer, would protect a French cargo, or

* American, under neutral or British names, there would be [* 169] coloring and covering without end.

He said, much regard would be paid to what sort of ports ships were bound. The nature of the trade at Dunkirk and Ostend was well known ; all the world smuggled there ; English and East India ships and others (it was well known) dropped their goods off there, in order to have them run into England to escape the king's duties. He was afraid that the brandy and handkerchiefs would turn out, if not enemy's property, a smuggling concern. No neutrals, unprivileged, can protect the goods of the king's enemies, without being such. To allow the privilege without strong grounds, would be to ruin this kingdom.

CONCORDIA AFFINITATIS,

A SWEDISH ship, and general carrier on freight, taken by his Majesty's ship The Quebec, bound to France from Hamburg, where she took in a cargo of hemp, pewter, copper, staves, hogsheads, and small casks. The master claimed the cargo generally, and swore that he received the goods from * a broker at Ham- [* 170] burg ; that he did not know the owner ; and that his orders from the Hamburg broker were to apply to a broker in France. Out of twenty-seven bills of lading, one named upon whose account, but no risk ; and one other named, account, and risk. Court restored the ship to the Swedish owners ; decreed farther proof of the property of the cargo, whensoever it should be duly claimed, and ordered the hemp, and such copper sheets as should appear to be fit for sheathing ships, to be sold for his Majesty's use at a fair valuation by merchants ; the freight and expenses of proceedings to make a part of the price, and the money to be brought into the registry for the use of the parties who should finally obtain the property upon a further hearing.

LES QUATRES FRERES.

[Claim to carry enemies' goods free under treaty of Copenhagen, overruled.] ¹

A DANISH ship, taken on the 7th of August by his Majesty's ship The Helena, bound from St. Vallery in France to Marseilles; a claim was given by the master for the ship, as Danish property, and for the cargo, as being on board a Danish ship.

[* 171] * The master and two more of the crew, who were examined, swore, that they believed the cargo (which was soap, liquorice, oil, cotton, brandy, and syrup) was French property. The question therefore turned upon the privilege of carrying free the enemy's goods, which was strenuously contended by the advocate for the claimants, on the ground of the treaty of Copenhagen, July the 11th, 1670, art. 40. The words are, "If the Hollanders, or any other nation whatever, have, or shall obtain from his Majesty of Great Britain any better articles, agreements, exemptions, or privileges, than what are contained in this treaty, the same, and like privileges, shall be granted to the king of Denmark and his subjects also, in a most full and effectual manner." So that the consequence followed, as it was argued, that the Dutch treaty and Danish must be considered as one. It was admitted, however, that the Danish passport on board was not such as the treaty prescribes, but of a very different tenor. It was contended, on the other side, that, for above a century, the privilege had never been allowed, and no

[* 172] * requisition ever made of it; and that the treaty not only requires a very special passport in terms as there described, but it is expressed in the 40th article, leading to the passport, (the form of which is inserted,) that the very end of the passport is, "lest goods, merchandises belonging to the enemy, may be fraudulently concealed, under color of amity; for preventing fraud," &c., &c. Therefore it clearly showed, that enemy's goods were not to be concealed, but may be (as in the 12th article of the treaty of Sweden, Whitehall, October 21, 1661, where a particular passport is required for the same purpose) taken out, and the goods of the enemy found in the ship of the confederate, but not the confederate's goods, made prize.

The judge [SIR JAMES MARRIOT] said, that there is but one way

[For treaties as to "free ships make free goods," see 1 C. Rob. 52.]

The Sarah and Bernhardus. 1 H. & M.

of expounding all grants and contracts, private or public. The ancient and uninterrupted usage, for above a century, is the best interpreter of the sentiments of the contracting parties; and grants of an especial privilege, deviating from the general law of citizens, or nations, are *stricti juris*. In the history of treaties, it does not appear * that the Danes have ever been allowed, or ever ex- [*173] ercised this privilege. An invariable series of precedents, in all former wars, and decisions of the king and council, showed the contrary, and the sense of both nations. At the first breaking out of hostilities, such as the present, it was natural enough for Danish subjects to feel the pulse of this country. But there is an obvious answer concerning the fortieth article of the treaty of Copenhagen, however strong it may seem in its expressions at first view. All the better articles, agreements, exemptions, or privileges therein mentioned, refer only to such as are or shall be granted to any other nation, [Sweden is excepted specially; for two nations, like other near neighbors, are very apt to envy and hate each other,] in regard to tariffs, and duties upon imports and exports. Had the article stood alone, the argument might have been more powerfully supported in favor of free ship, free goods; but all articles in a treaty must be taken, both in the letter and spirit, as one stipulation and contract. The spirit of the treaty, which forbids all aid of the enemy, * would be defeated by the privilege claimed, and the let- [*174] ter of the fortieth article totally overthrown; which article shows, that the enemy's goods are not to be concealed. All that can be drawn from this treaty is, that the ship and goods of the friend shall not be infected by the goods of the enemy, and so made prize according to the old practice of the law of nations, before the treaty. That besides the master and crew swearing that the cargo was French property, the claim itself was an evidence of it, that it was enemy's goods, because it insisted they were privileged by the ship. The judge said, he would never open a door for a new precedent, enabling Danes to protect the commerce of France. He would allow freight, and all reasonable incidental charges, as between merchant and merchant. Restored the ship as Danish, and condemned the cargo as French property.

THE SARAH AND BERNHARDUS

WAS a Danish ship, taken on the 2d of September, by The Active private ship; claimed as the property of the widow Ancker * and sons, Danish subjects; also the cargo of deals, four- [*175] teen guns mounted on carriages, and 8,000 iron shot, (not

for the ship's use,) bound from Christiana, in Norway, to Havre de Grace. The papers appeared to be false; the manifest was of goods consigned to Portsmouth; and the bills of lading were for the deals to be delivered to Azenberg and Freres, at Havre de Grace, for their own account and risk, but the cannon and balls at Portsmouth; and that bill of lading appeared, by affidavit of the captain, to have been found since the capture and delivery up of the rest of the papers. The master swore that he was to deliver the deals at Havre; and if he met with a good market there, to sell the cannon and balls, being the rest of the cargo, otherwise to bring it back; but if he met with contrary winds, he was to put into Portsmouth, and there to dispose of it.

The counsel for the captors pressed hard with the third article of the treaty of Copenhagen, in regard to warlike stores as contraband, and confiscable: and that the cannon and balls of course were so.

[*176] * But the court said, that as the stores were clearly Danish property, and destined for a market, either French or English, and as hostilities were not notified, and the concealment, if any, (for it was not fully proved,) was necessary to preserve the cannon and balls from confiscation in France, on account of Portsmouth being named, it showed no *mala fides* in the Danish widow and her sons; the court restored the ship, and ordered such of the deals as should be fit for the navy, and ordnance stores, to be sold for his Majesty's use, as in the other cases. Justified the seizure. The privateer to be at no expenses. Such cargoes for the future would be condemned, now hostilities were fully known and understood.

THE WANDRINGSMAN

Was a Swedish ship, taken the 2d of September by The Resolution privateer; bound to Udwalla, from Croisic, in Brittany; ship and cargo claimed as Swedish property; the latter for] Coch & Sons, residing at Udwalla, in Sweden. There were three bills of [*177] lading; laders all Frenchmen. Letter * A was a bill for wine and vinegar, expressing to be on account of Coch & Sons, but risk not expressed. Letter B was of divers goods, of which there was no evidence in the bills of lading, that it was for their risk as well as account. Letter C was for salt on account and risk of Coch & Sons.

E was coffee, expressed to be for the account of merchants at Bordeaux; and there was an acquittance on board in French; setting forth, that Weltners & Co., French merchants there, the laders,

The Veranderen, 1 H. & M.

had put the coffee on board for their account and risk, and that it was the produce of the French islands. The master endeavored to get rid of this, by saying, that this acquittance was obtained in Weltner's name, as his property, because French natives obtained a drawback upon coffee exported. The master expressed in his claim, that himself was one of the proprietors of the cargo, and his deserting this in his deposition was urged against him by the counsel for the captors. The court restored the ship, but thought it unnecessary to oblige the claimants to make, at a great expense, farther * proof of the property of the wine and vinegar in letter A, [* 178] the captor having made free with the wine: but directed farther proof of the different goods in letter B, consigned by the bills only to order. Restored the salt, letter C, as claimed; but the judge said he was struck with the consequences, and with the collusion which would follow, if a single witness, standing alone as the master did, were to be permitted in any case to aver against ship papers and public instruments. That if it were true that the Swede, as pretended, had personated a Frenchman, in obtaining the acquittance and drawback, he had made himself an adopted Frenchman, and was aiding the commerce of the produce and revenue of France. Therefore the coffee, E, must be condemned as the property of the person expressed to be a French merchant in the French acquittance; but it should be subject to freight; and the captor appearing by the evidence of the master, though not to have broken bulk, yet to have tapped and drank up a hogshead of wine, which was the master's private adventure, should pay the Swedish * mas- [* 179] ter for it.¹ That the master had not deserted his claim for himself, as was insisted, for every master of a ship has something on board of his own. Little inaccuracies are not to be minded; his property must be restored with the ship.

* VERANDEREN, otherwise LE CHANGEMENT. [* 180]

December 2, 1778.

A GENERAL ship upon freight, taken the 17th of August, by the privateer The Two Brothers, bound from Bordeaux to Dunkirk.

¹ [As to master's adventure, see The Calypso, 2 C. Rob. 298, note.]

The master gave a claim for the ship as belonging to himself, a part owner, and Dutch subject, as he called himself, and to others residing at Embden, subjects of the King of Prussia; but he gave no claim of any sort for the cargo, and declared, in evidence, that he knew nothing of the true owners and consignees; and so deposed all the rest of the crew, who were all Prussians. There were some goods on board, which were laden by Frenchmen, (Amand & Sons,) and consigned to Frenchmen on their account and risk. The master swore, that the cargo was laden by a French broker, for account of the persons who were the laders. A claim was given in for Berto and Lazarus Vallé, of the Haymarket, London, for two [* 181] tons of French vinegar; and *another claim was given in by Mr. Leidts, of Ghent in Flanders, (an Austrian subject,) for fourteen bales of coffee, and five bags of anniseed, as privileged on board a Dutch ship, according to treaty. It did not appear, by the bills of lading, that these goods were for the account and risk of the claimants; the whole cargo was put on board in June and July last. There was a pass, but it was not, as prescribed by treaty, truly granted to the master upon oath, appearing before them personally; but it was procured (as the master deposed) by a French and Dutch broker, for him, from the burgomasters of Appingedam; that the ship had never been in any port of Holland, but she was built in Embden, and her first voyage was from Embden to Bordeaux; and her last voyage from thence was destined to Dunkirk, in which she was taken. That he was born himself at Embden, a subject of the King of Prussia, but had obtained a Dutch burgher's brief of citizenship in the same way as he had obtained what he called a pass.

Together with the bills of lading were several acquittances [* 182] from the French *custom-house, corresponding with numbers and goods described in the bills; by which acquittances it appeared, either that the goods were for the account of the French laders, or that they had given bond to export them to the French colonies in America.

The court decreed restitution of the ship, as a Prussian ship; and that the freight and all expenses should be paid to the master, and be a charge upon the whole cargo. Condemned all such goods as appeared, either by the bills of lading, or acquittances, to be for the account and risk of French laders or consignees, or for which they had given bond at the French custom-house, to export to the French colonies.

The court admitted the claims of Berto Vallé and Leidts, and assigned them to prove the same; and allowed time till the first day of the next term for any neutrals to claim and prove the rest.

The Vander Leye. 1 H. & M.

The court observed, that after the ship's papers had been brought in, and examinations were public, the very late introducing of claims carried a suspicious appearance. The ship was taken the 13th of August; * Leidts did not claim till the 2d of Octo- [* 183] ber; and Berto Vallé's claim was not heard of till the 3d of November.

Berto Vallé, as a resident British subject, could not be allowed to claim, but under the favor of the circumstance that all the cargo was put on board before the declaration of reprisals.

That Leidts had almost confessed that the goods claimed by him were the effects of French enemies, since he claimed the privilege of the treaty for them; which was more than the Prussian master would do, who knew very well his ship was not a true Dutch ship, but a Prussian.

Now a Prussian ship has no privilege by treaty, nor by the custom of nations, to carry free the goods of enemies.

In case a ship appears not to have been in the neutral port, or the master to have obtained his passport in person, upon oath, of the ship being true neutral property, the French Admiralty Courts, by the late reglement, as well as by all former ones of that nation, confiscate both ship and cargo.

Neutrals will do well to turn their eyes towards those severities, and make the comparison, * in point of lenity and [* 184] justice, between England and her enemies.

THE VANDER LEYE,

WAS clearly a Dutch ship upon freight, with a Dutch pass, or sea-brief, and all other proper documents; the goods of an innocent nature, the property of Frenchmen, and bound from Amelsfort to Morlaix, taken by The Resolution privateer, and carried into Rye on the 9th of September.

The master claimed the ship as Dutch property, and the cargo as privileged on board a Dutch ship, according to treaty.

The court decreed both to be restored, with all costs and damages. The judge added, that if it had appeared in evidence, that the privateer had been guilty of any breaking bulk, or had misused the ship's crew, he would have punished the commander of the privateer in a more exemplary manner; ordered the costs to be settled by the registrar of the court, and the damages, (taking to his assistance for the latter two merchants, to be named by the parties, and approved by the court); and he recommended it to the parties, that the

[* 185] * English captors should name a Dutch merchant for themselves, and the Dutch claimant an English one for himself; so that the parties might be certain to have the two most reasonable men, and best arbitrators; and it was the more necessary to be recommended at this time, as national prejudices, and private passions and interests could not be too carefully guarded against in all such causes as these are, in disputes between nation and nation; for there are violent people everywhere ready to inflame matters for their own advantage, although the ruin of both countries might be the consequence of private vehemence. He would do his best to prevent it.

THE JEANE ISABELLE,

TAKEN the 4th of August, by his Majesty's ship The Kite cutter, a Swedish carrier ship upon general freight, bound from Alicant in Spain to Dunkirk; a claim was given by the master for his ship, and for his freight and charges; claims were also given for part of the cargo, chiefly wine and brandy, by P. De Bucher, an Aus-

[* 186] trian subject; by Mr. John Devette, of Ostend; * by Messrs. Walther & Pate, of Alicant, Spanish subjects; and by John Wombwell and Sir George Wombwell, of London, merchants, for themselves; and Peter Arabet & Co. their partners, at Alicant. But these claims not corresponding with the titles of property, the ship's papers, and the master not swearing to them, the judge ordered the neutral subject to make farther proof; and that the British subjects should prove in a manner still more strictly. Restored the ship to the Swedish subject, with freight and all his expenses; justified the seizure; all expenses to be charged to the account of the whole cargo. it was made a question, as in Berto Vallé's case, whether the Wombwells, as British, subjects, trading to an enemy's port, could claim. But the court observed, that the goods were all laden before the king's declaration of reprisals; and the master's instructions were, in the contingency of his finding war declared, and that he could not go to Dunkirk (which instructions plainly looked as if the goods were British property) that he should go to Ostend. The judge also

[* 187] observing, that there was a bill of lading for eleven * pipes and four half-pipes of brandy, for the account of Bellon & Son, Spanish subjects, but not saying for risk, and there being nobody appearing to claim for Bellon, or to make proof of his property, the court allowed time for Bellon & Sons to claim and verify. Concerning British claims, the judge said, he expected to have heard from the counsel for the captors of the case of the Spanish register ships,

The Vryheid. 1 H. & M.

on board which, in the war before last, the property (although proved) of British subjects, laden before the war, was condemned; that the principle of that decision, by the Lords Commissioners of Appeals, was not only the danger of collusion in covering the property of the enemy by British claims, but that the British laders were adopted as Spaniards; for, by the laws of Spain, no merchants can bring over bullion, &c., in the Spanish flota, unless in the names and as for account and risk of Spaniards, for which they pay an indulto, or duty to the king of Spain. But the judge said, he thought the case of Berto Vallé and of Messrs. Wombwell very different from that; and the extraordinary and sudden nature of the present hostilities

*required some lenity to be shown to British merchants. [* 188]

VRYHEID.

[A treaty defining contraband held not to protect enemies' property.]

A DUTCH ship, taken on the 26th of August by his Majesty's cutter The Kite, Lieutenant Trollope, commander, bound from Riga to Rochfort, the cargo seventy-one masts of above ninety feet in length, fit for the first rate ships of war, twelve small ditto, four hundred and sixty boat masts, one hundred spars, two thousand nine hundred deals, laden by Blanchenhagen of Riga, who ordered the master to touch at Elsineur, in Denmark, and to apply to the French consul for orders in regard to the destination. The master deposed to this fact, and that the French consul directed him accordingly to carry the naval stores to Rochfort; and that a broker there would instruct him to whom they were to be delivered. The Dutch master claimed his ship as Dutch property, having a sea-brief from the states, and duly documented; and the cargo as privileged under the treaty of December 11, 1674; with all costs and damages. The advocate for the captor consented to restitution * of the ship with [* 189] freight, but prayed condemnation of the stores as for the account of the French king. He strongly pressed, that the privileges had never been yet allowed that the Dutch should carry the naval stores of the enemy's government; that the privilege in such an extent as claimed was never in contemplation of the contracting parties, who were at the time of this treaty entering into an alliance offensive and defensive, and understood as engaging to have always the same friends and the same enemies; that the great federal union between England and Holland had since then been established, if possible, in a firmer manner. On the part of the Dutch claimant was urged the

fourth article of the treaty as explicit, that "masts, planks, boards, and beams of any kind of wood, and all other materials requisite for building or repairing ships, shall be wholly reputed free goods, so that the same may be freely transported and carried by the subjects of the states, to places under the obedience of the enemies of his said Majesty, except only to places besieged, blocked up, or invested."

[* 190] *The *Proctor* and *Advocate of the Admiralty* moved, that the stores might be sold on a fair valuation to the commissioners of the navy for his Majesty's use. The freight, the expenses of proceeding, and all other charges due to the Dutch claimant, to make a part of the price.

The judge, [SIR JAMES MARRIOT] gave his opinion nearly in the following terms: This question, of the highest national importance, turns, in my opinion, upon a great extent of comprehensive argument. To give the utmost force to the treaty of 1674, relied on by the claimants as the fort of their pretensions, the fourth article must be admitted to be in terms as stated. The first article stipulates, "Freedom to exercise all manner of traffic." Article 2d, "This freedom of commerce is not to be interrupted by reason of any war as to any kind of merchandise, but shall extend to all commodities which may be carried in time of peace; those only excepted which are described under the name of contraband." There follows the third article, affirming what shall be contraband, specifically naming [* 191] ing the sorts of * arms and ordnance, and lastly, in general words, "All other instruments of war."

The fourth article is negative of contraband; and masts, &c., are excepted from being contraband.

By the general law and usage of nations (treaties and extraordinary stipulations out of the question) there are two sorts of things confiscable, first, all those, generally, which belong to an enemy, found on board the ships of a friend: secondly, those which belong to a friend, but which will aid the enemy to maintain war. These latter are contraband; so that one of the ideas inseparably annexed to contraband, and to the exception of contraband, is, that the goods excepted or not excepted belong to a friend; from which it is clear that the goods of the Dutch subject, specially or generally enumerated in article third, are contraband; and that masts, &c., &c., and all other materials requisite for building and repairing ships, excepted in article fourth, do mean such masts, &c., which do also belong to the friend, and are going in the ordinary course of trade as ordinary merchandise, and for mercantile purposes. This must be the

natural sense * of the stipulation. For to admit a right of [* 192] being the privileged carriers of the enemy to the royal docks, would work such an adoption of a hostile character, would defeat every idea of alliance and confederacy of the contracting parties, and transfer the federal union over to the other belligerent.

The great argument is, that all subsisting treaties of commerce and alliance offensive and defensive, are to be taken as one contract, *uno contextu*, and the spirit of the federal union is to interpret the letter so that no one treaty, or article of the treaty, is to be taken substantive, or standing alone and single from the rest.

The secret article of Westminster, 1673-4, is as strong as possible. The words are, "Neither of the said parties shall give nor consent that any of their subjects or inhabitants shall give any aid, favor, or counsel, directly or indirectly, by land or by sea, or on the fresh waters, nor shall furnish nor consent that the subjects and inhabitants of their dominions and countries shall furnish any ships, soldiers, mariners, provisions, money, instruments of war, gunpowder, or any other things * necessary for making war, to the [* 193] enemies of the other party, of any rank or condition whatsoever." It is very clear that ships may be furnished by piecemeal as completely as if they sailed out of the Texel with all their furniture.

If one Dutch ship carries masts, another anchors, another cordage, another sails, another a ship's frame (and such there is now taken, of size for a seventy gun ship) a whole fleet may go by detail from Holland for the King of France's service.

It could never be the intention of the contracting parties, that Dutch ships, or English, *vice versa*, should become the transports of an enemy's government, for carrying free its stores of war either for sea or land.

Besides all this, the usage of nations is the best interpreter of all contracts; and it always has been the usage to pay the Dutch carrier for the enemy's stores, and for his freight; and the precedents of the usage universally acquiesced in during the last wars are worth all the reasonings of Grotius and Pufendorf.

* By decreeing naval stores to be sold to the public, and [* 194] the freight and all incidental charges, as between merchant and merchant, made a part of the price, the carrier has the benefit of the treaty; the great object is his cabotage or carrying trade; given him that, the spirit of the treaty is fulfilled. As to necessity, by the twenty-fourth article of the treaty of Bredah, "the persons of merchants, masters, and mariners of either party, their ships, goods, wares, and merchandises may be arrested or detained in the port of the

other, to serve in war, or for any other service upon an extraordinary necessity, and then just satisfaction shall be made."

Holland, in case of such necessity, may press English ships and seamen; and England may do the same *vice versa*. The *casus fœderis* exists; the dominions of Great Britain in America and her commerce on the ocean are invaded by France. The necessity is and can only be judged of by the party who claims the assistance; because if it rested with the other confederate to judge of the necessity, he would judge in his own cause, and elude the contract.

[* 195] * Whenever it comes to that, it may be urged with equal reason and plain sense:—"I say I am in necessity, and want your assistance." You say, "I am not in necessity, and you will not give the assistance." The reply is obvious:—"I know best my own wants and necessities, which I feel, and not you. If, therefore, you will not allow my demand, I will not allow yours. All is reciprocal. As you do not admit my necessity, I am under a necessity to refuse your privilege."

As to England having enjoyed the privilege of the treaty, it was but once (above a century ago.) But Holland, on the contrary, has used it so often as almost to wear it out.

In the present state of things, England, in a most extraordinary position, never possible in contemplation in the utmost range of the imagination of the contracting parties, engaged in a civil war with her own subjects of the whole continent of British America, and assailed, first privately, and then publicly, by France, cannot admit of the privilege of carrying the naval stores of the enemy, in [* 196] the extent claimed by the States, * without opening her breast to all her enemies, without defence.

She is obliged, by every principle of self-preservation, to snatch the sword from the hand of her assailants, let who will interfere and afford arms to that restless and malignant nation, who, in the weakness or destruction of Great Britain, will most assuredly involve the fate of Holland.

The JUDGE decreed the ship to be restored to the Dutch claimants, together with the value of the cargo; the naval stores to be sold, according to former precedents, for the use of his Majesty; all freight, expenses, and charges, both of the captor and claimant, to be paid by his Majesty. From this sentence, the proctor of the captor appealed, but the court ordered the execution of the sentence not to be suspended, and the captor to give adequate security to answer the appeal.

The Rebecca. 1 H. & M.

* THE REBECCA.

[* 197.]

December 5, 1778.

AN American ship, taken the 23d of August, 1778, by The Duchess of Kingston and Triumph, privateers, bound from Charleston, in South Carolina, to Bordeaux. A claim was given for the ship, as a recapture, on the part of Mr. John Strettel, who, in the affidavit annexed to his claim, swore that he bought her on the 8th of October, 1776, of George Catton, the then master, and of Benjamin and Calverly Bewick, Esquires, merchants of London, for 500*l.*, described to be of 180 tons burden, and then lying in the River Thames, with the ordinary clause of warranty, that they had good right, full power and authority to sell; that he sent her afterwards, under Catton's command, to St. Kitt's, about June, 1777; that in the very voyage she was taken by an American rebel privateer, and carried into Bedford, in New England.

Claims were given in by the following persons for the several parcels of the cargo:—

* Mr. William Creighton, for forty-three casks of indigo, [* 198] W. C.; Mr. Robert Ray, for twenty-six casks of indigo, two hogsheads of tobacco, R.; Mr. John Moncrief, for three hogsheads of tobacco, J. M.

The ground of their claim was that they were all compelled to leave Carolina in consequence of an act of state, (as it is called,) passed on the 28th of March, 1778, by the rebel government, obliging all persons to abjure his Majesty, King George III., to take an oath of allegiance to the pretended States, otherwise to depart the colony in sixty days; to sell all their estates, on pain of being apprehended, and committed to prison on refusal, upon tender of the oath. Under the further penalty, upon neglect or refusal, to be made incapable of exercising any profession, trade, art, or mystery; buying, selling, acquiring, or conveying any property, such property to be forfeited, one half to the informer, the other half to the state; obliging them to sell their estates, and their attorneys to remit the amount within twelve months; and on failure in point of time, to pay the same into the treasury of the state; persons * so withdraw- [* 199] ing, and returning, to be adjudged guilty of treason against the state, and, on conviction, to suffer death as traitors.

These claims were opposed by the captors on the ground of the danger of admitting collusive claims to avoid the prohibitory act of parliament, under pretence of being exiled loyal Americans, with

respect to the cargo; and in regard to the ship it was objected that its identity was not proved by any affidavit (as is usual in the like cases) of any person having inspected the ship, and that the tonnage differed, this ship being deposed to be of 300 tons, and Strettel's affidavit and bill of sale, annexed to his claim, setting forth that the ship claimed was only of 180 tons burden.

The counsel for Strettel urged that he ought to be allowed farther time to prove his property, and that variations of tonnage in passports and depositions were frequent in almost every contested cause, particularly the Dutch.

It was argued, in favor of the claimants of the cargo, that in several decisions by the late judge in the cases of Governor [* 200] * Bull, Mr. Angus Macauley, Mr. Telfair, and others, Americans, coming over with their property for their support, and not for the purposes of trade, their properties had been restored, notwithstanding the prohibitory act.

The court decreed that Strettel should prove the property and identity of the ship; was of opinion that an affidavit of inspection is always necessary; that the difference of the tonnage, between 180 tons in the bill of sale and 300 tons in the depositions, was too great not to make the identity very suspicious; that the warranty in the bill was not sufficient evidence of the property; for persons may have (as it is there said) good right, full power, and authority to sell, and yet they may be only the attorneys of the seller. Everybody knows that almost all trade is now, and has been for many years, carried on in this kingdom, and, indeed, in almost all Europe and the colonies, by commission. There should be some proof of the ship's register, and evidence that the sellers did not act by letter of attorney.

Collusion is very obvious in the transferring of property of [* 201] * ships; and though this idea was often urged in several causes determined at the beginning of the rebellion, and soon after the prohibitory act, as a reason to show the necessity of merchants, purchasers of American ships, strictly proving that they were *bonâ fide* transferred, yet the argument was pressed in vain; and it was said, "We do not sit here to determine upon title deeds;" however, it is now high time to require strict proof of the titles of ships claimed as British property.

An attempt was made by the counsel for the captors to read an affidavit made by Chase, the master of The Rebecca, to show that the ship belonged to Quakers at Philadelphia; that Catton, being an eighth part-owner of the ship, and the remainder being the property of the Quakers, on the first news of the prohibitory act, the ship being then at Falmouth, set off for London, and there made a false

bill of sale, with a view to prevent the ship being seized by government, and then sailed with false papers for St. Kitt's, where he took in a lading of sugars, when he was met by the American privateer, and the cargo was condemned * at Dartmouth, in [* 202] Massachusetts Bay, as British property, and the ship as having carried on trade with Great Britain, and for having fired upon two American privateers. This affidavit was dated the 9th of September last, and sworn before the commissioners at Guernsey; and the judge, observing that the preparatory examination of the master and crew bore date the same day, rejected the affidavit as exceedingly irregular, and ordered the commissioners to be severely reprimanded for taking it, and to adhere strictly to the standing interrogatories for the future; for that every kind of subornation must be expected, if a witness, after giving his evidence upon the interrogatories, is suffered to swear again to the same matter, upon affidavit; that the master, Chase, declared himself a subject of the States of America, and seemed to bear no good will to the claimant of the ship. It was very remarkable that the captors should obtain and bring in such an affidavit, especially as the master had already sworn upon interrogatories that the ship was condemned by the Judge of the Admiralty of Massachusetts Bay, as a prize on * account of [* 203] her having English property on board, although she was then the property of some Quakers at Philadelphia.

In respect to the claims of Creighton, Ray, and Moncrief, the Judge [SIR JAMES MARRIOT] gave his opinion, in substance nearly as follows:

The precedents quoted show plainly that there are cases out of the view of the prohibitory act. I hear of precedents with pain, as well as this audience, when it is recollected by whom those precedents were made. The utmost respect is to be paid to great names, but I must judge in every case for myself, according to my own conviction and ideas. It is easy to decide, when an act of parliament marks the line by which a court is mechanically to be guided. When there is no act of the legislature, or where it does not extend to the subject in dispute, his Majesty's commission directs the judge of this court to proceed in a summary manner, and according to the equity of the case. The late judge, in the cases of Governor Bull, Angus Macauley, Millegan, Carne, and Savage, said he would be bound by no precedents; I say the * same; but I will be bound by [* 204] the principle of a precedent, and not by the letter.

In the cases of Governor Bull, Angus Macauley, and Millegan, it was agreed, that the ejecting and abjuring acts of the pretended American States being subsequent in point of time to the prohibitory

act of the British legislature, the cases of the American exiles under certain circumstances are out of the view and line of the prohibitory act; consequently their effects when taken as prize, may be restored. Savage's case has been quoted to show that the effects of Americans coming over may be condemned. Though counsel do not misrepresent cases, yet they are apt to stop half way. In Savage's case,¹ there was the fullest evidence from a family letter that Savage was to return to America again. His property and Carne's were also insured by a rebel insuring bank set up by public authority. It is admitted to be in proof that Creighton had the abjuring oath tendered to him, and refused it; and that he has a bill of lading to verify his indigo. It is objected to Ray, that it does not appear that [*205] the oath was tendered to him; and *the same objection is made to Moncrief. It is also said, that neither Moncrief nor Ray came under any description as being public officers of the crown, or being of any religious or liberal profession. Now, as to Ray, he is a schoolmaster, which in the colonies is a very important and reputable profession; he brings with him his wife and children, which proves he has quitted all domicility in the colony. He has a bill of lading of his property. Moncrief has the same. And as to Moncrief, the letters from Mr. Ancrum and Mackenzie sufficiently show him to be exiled forever from the colony. Ancrum's letter is from a sensible, cool man. It refers his correspondence to Mr. Moncrief as having left the country, and merits notice as a picture of the miserable state of it. Mr. Andrew Mackenzie, in his letter to Mr. Redhead, at Nantes, says, "this goes by my worthy friend, J. Moncrief, who leaves this place, I am afraid, for ever." It is urged that the several permits to the master, issued from the pretended Secretary's office, to take on board these unfortunate passengers, [*206] show that they have complied with the law of *the pretended government, and therefore, it is said, they are its friends.

It is cruel to draw so false a consequence. The fact proves the contrary. For what is the law which they have complied with? It is this, "abjure your king, your country, curse God and them," or do what? Depart! begone! Depart is the law referred to by the permits; and this law of departing from all that is dear to man have the unhappy exiles complied with. "Those who are not with us are against us," is the principle of this act of state: "Return not again hither; if you dare, you die." Death is the alternative, whether you stay or return, "for you shall exercise no means of living here." It

¹ [The Sally, Hay & M. 33.]

matters not whether the oath is tendered or not. The words of the act are, "Every person neglecting or refusing to take the oath within the time limited by this act, and remaining in the state more than sixty days thereafter, shall be incapable henceforth of exercising any profession, trade, art, or mystery, or of buying, selling, or acquiring, or conveying any property whatever; and all property so bought or sold, acquired or conveyed, * shall be forfeited, [* 207] and disposed of, one half to the informer, and the other half to the state, and the person or persons so buying, selling, acquiring, or conveying, as aforesaid, shall likewise forfeit the sum of one hundred pounds current money to the state, for every act and thing which he or they shall do, which he or they is or are hereby disqualified from doing.

The very time to collect their debts, to dispose of their effects, and for their attorneys to remit, is limited to a very short period of a year, on failure of which also is a forfeiture of the effects to the state; and to this limitation is added another law, that no cargoes, although as remittances, shall be permitted to go to Great Britain.

This abominable law, if law it can be called, is equal to that of the Romans, when they banished a citizen by the interdiction of water and fire, and all the necessaries of life. The wit of man could not have devised a more cruel, penal ordinance, to gratify the purposes of the vilest of passions, ambition and avarice, in their utmost extent. No man is to be allowed capable * of any civil act, [* 208] unless he carries the mark of the beast of rebellion in his forehead. It is wonderful that their religious enthusiasts have not found out the completion of the prophecy in the book. If the multitude had sense enough to reflect, they might easily discover the real principles and intentions of their leaders in framing this ordinance, which is dipped in blood. Their purpose is plain, that of getting rid of every opposer; but this madness will cure itself, we may venture to pronounce, with a very little foresight; whatever is contrary to all natural justice, and the general feelings of mankind, can never last long. This ordinance confounds all civil rights, and tears asunder the dearest ties of human kind; and the true tendency of it, in its fury, is either to uncolonize America, or it will occasion a sense of general distress, with the connections of families, to bring back a restitution of the former government.

There is a wildness in this law, that marks strongly the real character of the Americans; it is perfectly savage; and breathes the spirit of persecution, impressed with which, (as having been persecuted * or persecuting,) the last settlers from hence [* 209] went forth to sow the seeds of that civil war which they left behind them, and of which now Great Britain reaps the harvest;

it is among the many proofs we find in the history of mankind that conquerors and new settlers in all ages have adopted, in a very great degree, the manners of the ancient inhabitants, and taken even the features, colors, and temper of the climate.

The picture of American misery, drawn upon those people by their new modellers of government, has been strongly painted in many letters read in this place, as well as in those now before the court : and it is for this tyranny that the curse in the book, denounced upon the Jewish nation, which drove out others for their crimes, and planted itself in their room, seems to be completing fast on the British rebellious colonies. It is for this cause (the imitation of like cruelties) "that the land shall vomit forth its inhabitants." This is the sacred language, which may appear coarse to modern and refined

ears, but it is strong and expressive. At this moment America is sick ; she is in agonies. When therefore the ejected, unhappy children fly to the mother country for protection, shall she not open her arms to receive them ? or shall they be the prey to their fellow-subjects the captors, naked, exiled, and defenceless ? To be driven out from all that is dear, and to be the sacrifice by turns of both friends and foes, is the fate of the best of men in the midst of civil dissensions. A civil war is a dreadful scene, too much for human nature to bear, or to express. Can this court want any better ground for a restitution to the unhappy sufferers in this case, than the evidence of the master, (who is himself a declared subject of the pretended States, and appears no friend in this cause,) he says, that all these poor people were finally destined to England, and that that they are all subject to King George the Third.

This being so, what must be their fate if they return ? Death. The rebel act of the state has pronounced the sentence ; they are to suffer death as traitors. The unhappy men have positively sworn, that the property claimed by them is not for the purpose of trade, but for their necessary sustenance, and that they have left all

[*211] the *rest of their effects behind them, to the mercy of a tyrant government, in order to live under the milder one of the parent country. Shall this court then condemn them ? Will this nation be equally merciless with the American government ? Shall we not leave them a drop of water, and a bit of bread ? It is no such great disadvantage to their cause, as in Governor Bull's and Telfair's cases, that they do not bring certificates of oaths tendered, and their refusals, from members of the rebel States. It was argued, in those cases, that such certificates looked like an obvious method of evading the prohibitory act, and carrying on a rebel trade. Their families, their estates, their trading concerns, it was said, are connected, and they will cover for one another. Governor Bull brought

over great property, and left a large estate behind him. Telfair brought over a cargo of 20,000*l.* value in tobacco. He was documented by certificates from the members of the congress, that he had refused to swear. He had General Howe's license; it was thought a weak part of his cause; but he brought over his property (he swore to it) and his *person together. Whenever the [* 212] person and the property have not come together, the court, in former cases, condemned the effects which came in a different ship, although claimed as a remittance, after a period limited by the act. Distinctions of quantity were set up in the first instances, but these were afterwards overruled: for how was it possible to draw the line? If a man brought his all with him, and was ejected from America so as not to be able to return, it was held enough to ground a sentence of restitution. It is very true, the prohibitory act is a very severe law. It was meant *in terrorem*, and it was expected to have had a happier effect, to produce submission; it unfortunately produced an increased resistance. The declared independence of the American congress took the first lead, and gave birth to a law here, that carried with it an actual attainder of all the enumerated colonies in rebellion. The effects of all the inhabitants, without distinction, and their ships going to and from thence, were declared confiscable as the goods of open enemies. It was said, that nothing could be more unjust than to confound the innocent and the guilty. It was replied, "that *it was impossible to make [* 213] distinction; that in the government of the moral and natural world, the just ruler of the universe suffered storms and lightning to fall equally on the good man and on the sinner; the end justified the means, and the sufferers must turn their resentment upon those men who are the causes of their misfortunes." A time, however, has come, when a distinction may be made. No one, at the instant of passing that act, could foresee, what has since happened; an event out of the contemplation of the legislature, that the American congress would afterwards enact an abjuring and ejecting law.

If the captors think this court has done too much in former precedents, or that I do too much in adhering to the principle of those precedents, which, to my conviction, are founded upon justice and mercy, the captors must appeal.

Supposing that, by the prohibitory act, there is any power of appealing from this court (which is not expressed); and if the prohibitory act is insisted upon in its utmost severity, the sense of that law will be best explained in another place. I hold this *case to be out of the act. After all, if I am mistaken, [* 214] I shall be happy in the error; and I can only refer, so far as

The Hope. 1 H. & M.

regards this court and my own opinion, to the expressions and feelings of the old Roman,

Si pugnent sententiæ, valeat mitior.

“When opposite opinions are equal, humanity should prevail.”

The judge accordingly pronounced the ship to have belonged to British subjects, condemned the rice on board as the property of rebel Americans, but restored the several quantities of indigo and tobacco, claimed as the property of Creighton, Ray, and Moncrief, who were destined to England, not being for the purpose of trade, but for their necessary support, and not being within the view and penalties of the statute.

[* 215] * LE ZACHARIE and LA VIGILANTIA,

December 9, 1778.

SWEDISH ships, were restored with freight, and all expenses charged on the cargoes. Condemned the cargo of tobacco freighted for the farmers-general in France. Further proof of the rest of the cargo.

THE GOEDE HOOP,

A PRUSSIAN ship, was restored with freight, and all charges to be placed to the account of the cargo. Two hundred barrels of potash, on account and risk of Messrs. Fizeaux & Sons, at St. Valery in France, and thirty-six casks for Mons. Hoquet, were condemned. Time allowed, till the first day of next term, for any neutral subjects who should be entitled to the rest of the cargo, to claim, specify and prove their property, the bills of lading being defective.

[* 216] * THE HOPE,

Friday, December 11, 1778.

AN American ship, with pitch, tar, indigo, and rice, and deer skins, taken by The Surprise, an uncommissioned vessel, of Folkstone.

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The ship was claimed by Sir Edmund Head, Mr. Hest, and Mr. Kincaid, who had bought the same to convey themselves and their properties from South Carolina, being driven from thence by the abjuring ordinances. It was also claimed by a merchant of London, Mr. Bell, as having been his property, under the name of the True Briton.

There were also a great number of unfortunate sufferers who claimed their properties. This ship, after being taken by the Folkstone cutter, fell in with The Griffin and Speedwell ships of war, who assumed a right as captors of ship and cargo. An appearance was also for the Lords of the Admiralty, as for a droit. The judge rejected both the pretensions of the king's ships, and of the Lords of the Admiralty; * restored the several parts of the cargoes [* 217] claimed by the American British subjects refugees; and ordered Mr. Bell to prove his property in the recapture more fully. Salvage to the cutter.

THE HOPPET,

A SWEDISH ship, bound to Nantz, was restored to the Swedish claimants, with freight and all reasonable expenses to be charged to the account of the cargo; and the neutral claimants, on account of the property not being verified by the master and the ship's papers, and particularly the clearances, not mentioning but a very small part, farther proof was decreed; and the naval stores on board, cannon balls, pitch, tar, sail-cloth, and copper-sheets for sheathing, were ordered to be sold for the use of his Majesty's navy, on a fair valuation by merchants, to be named on each side, chargeable on an average with the expenses of both captor and claimant.

THE ENEKEIT,

A DANISH ship, restored, with freight and all reasonable charges placed to the account of the cargo, which, being French, was condemned.

* THE BEE.

[* 218]

THE judge refused to hear affidavits to justify a captor from costs, who had not examined his witnesses, and pretended to have lost the ship's papers, yet offered restitution without costs, which the other

The Zelden Rust. 1 H. & M.

party would not accept without costs. The court said, the unity of a prize cause ought not to be divided. When the ship's papers and examinations came regularly before the court, it would judge of costs, *uno instanti*; and immediately ordered the witnesses, the crew of the captured vessel, to be produced, and the judge administered the oath himself. He said, there was strong suspicion of collusion on both sides from the captor's own opening, and he would make parties proceed regularly; much danger lurked sometimes under proposals of consent, and every thing grew suspicious when parties go out of the way. In American cases, in particular, it was obvious how many contrivances are used to supply the enemies of this country.

[* 219]

* THE HET FORTUYNE,

December 18, 1778.

A DUTCH ship, was restored, bound from Port Maurice to Havre de Grace, taken the 20th of September, 1778, by the privateer ship The Molly. The question as to costs and damages was reserved till next court on petition of both parties.

VROW MARGARETTA,

A HAMBURGER ship, bound from Hamburg to Bayonne, a general carrier ship. The ship was restored with freight, and all expenses charged on the cargo, (and the master's own adventure was also restored,) neutrals assigned to prove their property not verified by the master.

THE XAVIER,

A FRENCH ship, taken by The Swallow and Speedwell, private ships, before the date of their letters of marque, was condemned as a droit of Admiralty, and the takers are to petition the Lords to refer them to the court to be rewarded.

[* 220]

* THE ZELDEN RUST,

A DUTCH ship, with a cargo laden at Marseilles for Havre de

The Bee. 1 H. & M.

Grace, was a very particular case. On the 17th of July she met with a Spanish man-of-war, the captain of which obliged the Dutchman to take on board gold and silver to the amount of eight hundred thousand dollars, with a Spanish supercargo, and to carry them to Havre. This ship was taken by The Fortune privateer. The Dutch captain claimed his ship and the cargo as privileged by treaty, and several Spanish subjects claimed the gold and silver. The judge restored the ship and cargo to the several claimants, and condemned the captain in full costs and damages.

JONGE GUILLIAM,

A HAMBURGER, taken by the private ship Active. Ship was restored with freight, and all expenses charged on the cargo. Neutrals to prove their property not verified by the depositions. Copper sheets to be sold to his Majesty.

* LA MIGNONE,

[* 221]

A RECAPTURE. Restored the ship to British claimants, with salvage to the captors. Cargo condemned as a droit of admiralty; the captains of the private ships Defiance and Conway not having letters of marque.

JUFFROW ANNA GEDTRUTH,

A HAMBURGER, general carrier ship, restored with freight, and all expenses charged on the cargo. Neutral laders to prove their property, not verified by depositions of the master. Sail-cloth, deals, and copper sheets to be sold for his Majesty's use.

THE BEE,

RESTORED to British subjects on hearing the examination, and the question of costs and damages reserved by petitions of both parties, and the captor to bring in the ship's papers.

[* 222]

* THE RENARD.¹

December 9, 1778.

THIS was a vessel first taken by the French, carried by them into Havre de Grace, condemned judicially, and by them fitted out as a privateer; retaken by The Lark privateer. A claim was given by one Mr. Lad, and others, as their property. The French witnesses deposed, that she was an English prize; objection was taken, by the counsel for the captors, to the identification, there being a variation of tonnage between the French papers and the affidavit of the claimant. But the great question was, whether (this vessel having been completely in the enemy's port and possession, and condemned in France) the property of the original British owner was not entirely defeated; and if not, that the *quantum* of salvage to be allowed was to be considered? because there is no prize-act, in the present case, of hostilities with France; and that the American privateer act gives only one eighth even to privateers, which in former prize-acts, in time of war, used always to give to privateers a salvage

[* 223] * proportionable to the number of hours any ship, retaken from the enemy, shall have been in the enemy's possession; although men of war had never more than an eighth salvage. In support of the argument, that no salvage was due, quotations were made from Grotius, who considers occupancy by the enemy for twenty-four hours as a divesting of the original property, and as good a transfer, by the law of nations, as bargain and sale by the civil law.

Bynkershoek, a modern Dutch writer, now much in esteem and fashion, opposes the sentiments of Grotius, and says, that an occupancy of twenty-four hours is not sufficient; but there must be such a bringing into port, as that all hope of recovery is lost with the ship.

This idea of Bynkershoek was said to agree with the common law of England, as laid down in Brooke's Abridgement, Tit. Property, forfeiture 38:—“ If an enemy takes an Englishman's goods, the former owners (says he) shall loose his property; and it becomes indefeasably vested in the first taker, unless it shall be retaken

[* 224] the same day, and the first owner puts in his * claim before sun-set.” From whence a conclusion is to be drawn, that a

¹ [See L'Actif, Edw. 185.]

possession of a certain time, even without a sentence, defeats the first owner.

The court observed, that there is something ridiculous in the decisive manner each lawyer, as quoted, had given his opinion. Grotius might as well have laid down, for a rule, twelve hours, as twenty-four; or forty-eight, as twelve. A pedantic man in his closet dictates the law of nations; every body quotes, and nobody minds him. The usage is plainly as arbitrary as it is uncertain; and who shall decide when doctors disagree? Bynkershoek, as it is natural to every writer or speaker who comes after another, is delighted to contradict Grotius; his rule is, that the prize must not only be brought, *infra præsidia*, into the port, and under the guns of the enemy, but so that all hope of recovery is lost. But this rule will not do, it is plain; because the fact is, the ship is recovered.

As to Master Brooke's rule, there is neither sense nor justice in it. The property, he says, is lost between an Englishman and Englishman, unless it is retaken in twelve *hours; and be- [* 225] sides that, it must be reclaimed before sun-set. What! when the original owner at land knows nothing of his ship being taken by the enemy at sea? and how, and where, and from whom, can he reclaim her? From the enemy? The rule is nonsensical, for it is impossible. I take the general law to be, and it is equity, that a British subject has always a right to his own again, when found in the hands of another British subject, and can maintain his suit for it, paying a salvage proportionable to the expense and danger, and other circumstances.

This doctrine is just, in the relation in which one British stands to another British subject, and does not at all controvert the principle that a lawful enemy in war may acquire property by occupancy, and may transfer it to a third party, who is not forbid from such purchase by any especial treaty.

In the present case, the state of hostilities is more favorable to the claimant than a declared war. What is declared then? Reprisals upon the French king, his subjects, and the inhabitants of his *territories. But British subjects generally, (the case of [* 226] the Americans being out of the question) are not to make reprisals upon one another; there is no authority for that. Clearly the American act does not extend to the present question of salvage. There is no act relative to recaptures from the French. It rests then with the court. By what rule can it direct its discretion? The old war prize-acts have pointed out a rule, which the court may adopt, not as binding on the judgment of the court, but as declaring the practice. A man-of-war being paid by the public, and fitted out at the national expense, had, by the act, only an eighth of the recapture,

if a merchant ship; but a privateer retaking, after a ship had been in the possession above ninety-six hours, was to have a moiety; and a man-of-war, as well as a privateer, retaking a British ship, the same being fitted out for war by the enemy, had a moiety. In this case the recaptured vessel appears to have been fitted out as a privateer, and therefore I have no doubt to decree a moiety as salvage, and restore the ship to the original owners; the variation of the tonnage [* 227] is accounted for by *the difference of the French and English computation, and admitted by the counsel.

THE LUCRETIA.

[Salvage. Vessel captured, recaptured while at sea, and afterwards again captured.]

THIS was an American ship, first taken in her passage from Charlestown to Surinam, by The Thynne packet-boat, having a commission of marque. The commander of The Thynne put six or seven men on board, and a prize-master. They kept possession ten days, and were afterwards taken by an American privateer, who kept possession thirteen days; when being met (The Thynne's people still remaining on board in her) were directed to Boston by The Seaford, Cygnet, and Speedwell, his Majesty's ships; they recovered her again from the enemy. It was insisted on their part, that they were to be considered as the only captors, and that The Thynne packet-boat had been divested by the possession of the enemy. It was also observed, that the American act, which restores all British ships to their own original owners, and gives to the takers, whether men-of-war, [* 228] or other vessels under his Majesty's *protection, only one eighth for salvage, relates only in terminis to such ships which shall be proved to have belonged (that is originally) to any of his Majesty's subjects of Great Britain and Ireland; therefore this ship, The Lucretia, having been an American ship taken by a commissioned packet, and lost again, being recovered on the 3d instant, was not a recapture within the statute. Many of the same arguments were used again, as in the case of The Renard. The case of The Magdaleine, in the last war was quoted; it was a French ship, taken by The Beckford privateer near Jamaica, and retaken by a French ship, The Hereuse, on the 6th of April; but eight days after was recovered again by The Cornwall privateer. Sir Thomas Salusbury, the then judge, decreed the whole to the recaptors; and this he did upon the strength of the same opinion given by Sir George Lee in the cases of The Notre Dame and Sarah Smith, referred to him as

counsel in 1747. It was argued, that no property vested in the first taker, because the possession was not complete; the prize having never been brought *infra præsidia*, much * less con- [* 229] demned; and the counsel quoted the case of *Goss v. Withers*, in Burrow's Reports, volume 2, p. 90; in which an English ship, having been eight days in the hands of the French, the insurers claimed the whole again, upon a recapture; and the question was, whether eight days' possession had divested the original owners? But it was the opinion of a very great man, that no property of an Englishman is changed till after condemnation; but this doctrine was, as of common law, *sublato statuto*, the prize-act concerning recaptures being laid out of the case.

The court thought this case of *The Lucretia* a new and refined one, and that the arguments were equally refined. It was agreed on all sides, that this kind of recapture was out of the prohibitory statute. The argument used to prove that a complete property did not vest in *The Thynne* packet, the first taker, is two edged. It cuts both ways; for if a complete property did not vest in *The Thynne*, because *The Thynne* did not carry the prize into port, the same reason held against the Americans divesting *The Thynne*; for they * never carried the vessel they retook into port. The ques- [* 230] tion is not, whether a complete property vested in *The Thynne* upon the taking, but whether a property vested enough to have entitled *The Thynne* upon condemnation whensoever.

In all former prize acts several limitations of time were established with a singular nicety scarcely capable of proof, to ascertain the *quantum* of salvage. If a vessel was retaken after being in possession twenty-four hours, the salvage was to be one eighth of the value; if above twenty-four hours, and under forty-eight, a fifth; if above forty-eight, and under ninety-six, a third part; if above ninety-six, a moiety. All this was borrowed from a placart of the Dutch States, dated 6th June, 1702, and the same rule is laid down by their countryman, Voet de Jure Militari, p. 299.

One should imagine that the inventors of these distinctions and divisions, who doubtless were very sagacious persons, expected captors to have stop-watches, and to be the honestest people in the world in producing them. The divisions of time in those acts to mark the quantity of salvage seem as absurd, as in the acts which some * years ago established the jurisdictions of our new [* 231] Vice-Admiralty Courts in America, and limited their jurisdiction, not where the prize should be brought in, but by minutes of longitude and latitude where the prize should be taken. One should imagine, that these nice distinctions were only meant to increase liti-

gations; so that so far from the court agreeing with the counsel, that it was an oversight in the framers of the American act to omit the distinctions of time, it should seem that they wisely omitted these distinctions, and that the simplest rule is the best and most equitable.

Now in regard to the general law, no property of any prize vests in the captors until condemnation. All prize of war vests originally in the state, or in its great representative, wherever representation resides; till it is granted to the captor. And the possessory right, as was observed by one of the advocates, is only *sub modo*. This inherent original right of prize is clearly in the crown, and so by the king's proclamation after adjudication to the king in his Majesty's

name, and not otherwise. Ships and goods taken by the [* 232] king's ships, being * finally adjudged lawful prize are granted to the officers, seamen, &c.; and vessels taken by private ships having letters of marque are granted to be sold and disposed of by the merchants and fitters for their own use and benefit, after adjudication, and not before. Among the ancient Romans the amount of all captures in war was brought into the public treasury. If we look into the American letters of marque act, the words clearly give an interest in the captors on board ships with letters of marque, which interest is vested upon the taking. The words are "Such ships, &c., so to be taken by, or with such ship, according to such commission, being first adjudged lawful prize, shall wholly and entirely belong to the owners of such ships and persons on board the same;" and then follows an exclusive clause in very strong terms, to take away all right of the crown, Lord High Admiral, and commissioners, to any share or part therein. The great object of the legislature was to encourage taking, and this principle, will easily decide the present question. There is also another reason in favor

[* 233] of The Thynne packet-boat, which has not * been taken notice of, which is, that The Thynne taking The Lucretia was the primary cause of The Lucretia being also taken ultimately by the king's ships. The Lucretia was bound from Charleston to Surinam, when taken by The Thynne, her voyage then being changed for Falmouth, by order of the commander of The Thynne, in her way thither she was retaken by the Americans, and then by them destined for Massachusetts Bay, in which course she fell in the track of the men of war. This was a very proper case to have been settled by private agreement between parties; but as they have determined to apply to this court for a decision, we must endeavor to square the decree by the equity of the case, and yet conformably to the style of the court. Let the officers and crew of The Thynne be pronounced to be the captors of The Lucretia, recovered by the Americans. Let the officers and crews of the king's ships, The Cygnet, Swallow, and

The Bonaventura. 1 H. & M.

Speedwell, be pronounced to be the recaptors ; but, under the circumstances of this case, I am of opinion the latter are entitled to a salvage of the ship and cargo, equal to the share of joint captors.

* BRITA CÆCILIA.

[* 234]

January 8, 1779.

A SWEDISH ship: the ship restored, and the cargo of iron, tar, pitch, and deals, for the account of Messrs. Du Jardin Prusse, of Paris, condemned. Destined from Elsinour to Brest and Nantz. Freight and all reasonable charges allowed to the Swedish carrier.

WYNBERG,

A SWEDISH ship, bound from Bordeaux to Stockholm ; ship restored, with the master's adventure, and all expenses charged on the cargo ; the greatest part of which being coffee, indigo, sugar, and paper, laden on board for the account of persons resident at Bordeaux, as well as tobacco, with acquittances from the French government, entitling the laders, as French subjects, to drawbacks, together with tobacco, in like manner, was condemned.

LE PERLAN,

[* 235]

A SWEDISH ship, restored : cargo, deals and pipe-staves, claimed by Swedes, and pitch and tar for the Berlin Society, were ordered to be sold for the use of his Majesty's navy, upon a valuation by merchants named on each side, for the profit of the claimants ; all expenses on both sides to be charged to the buyer.

THE BONAVENTURA,

A SWEDISH ship: the cargo being in a perishable condition, the court, by agreement of both parties, ordered the cargo to be sold and deposited.

THE MINERVA,

WAS claimed as a Portuguese ship, and the cargo as being privileged on board a Portuguese vessel. It was clear in evidence, both from Portuguese and Frenchmen, that the lading was British American tobacco, and British package, and the ship came with it to Fayal from St. Domingo, and the cargo was never unloaded at [* 236] Fayal, although searched, and duties were paid there. * The ship was French built, and there was no Portuguese passport for the ship. Several Frenchmen came in the ship from St. Domingo to Fayal, and one of them was on board at the time of the capture, Mons. La Confourgue. This man, on his examination, gave in his name as Jean Augur, and it appeared he had been travelling in British America; and his giving in a false name was sworn to by the Portuguese master and mate. His identity was also proved by a verbal process, and by an inventory of a deceased person's effects on board the ship, made in the French language, and signed by Jean La Confourgue, and Pierre Queiron, another Frenchman. The deceased person was a boatswain, who was drowned after the capture, and for whom as a seaman, agreeable to the French laws, the owners of the ship were answerable to the French government, which enregisters all seamen. Although La Confourgue, otherwise Auger, swore positively that he had no interest in the ship at or before her arrival, or during her stay at Fayal, it was said that this very same La Confourgue, and another Frenchman, with the assistance of the [* 237] * French consul, sold the ship to one Joseph de Macedo, a Portuguese, for 800 millrees, equal only to 200*l.* sterling; yet, it appeared by a bill drawn on Wandewal, of Amsterdam, that the very freightage to be paid was to be 1600 millrees, and that he produced an order from the rest of the French owners to sell the ship. The charter-party was for a freight double the value of the ship made at Fayal, and was signed not only by the French, but the English consul, Graham. There was a certificate of the sale of the ship, by a Portuguese judge, for this very inadequate price, which they also legalized, that is, certified to the judge's signature, but no proof of the sale or transfer of the cargo; and the master swore that the sale of the ship only was truly made. It was very remarkable that there was a Portuguese passport for the persons on board as passengers, and not for the ship. Jean Auger was there described under the name of Joas (abbreviation for Joannes) La Confourgue. There was not a single Portuguese paper on board upon oath, and the ship and La Confourgue were destined for Amsterdam. On board

* this ship was a very extraordinary letter by the Eng- [* 238] lish consul, Graham, addressed to Mr. Sykes, a merchant in London, recommending the master, Caneoto, to him. This letter, notwithstanding the above destination, was underwritten, "this goes *via* Lisbon." It recited that this ship had put into Fayal for water and biscuit only; that the tobacco was taken as a debt. Cartage was an article of the charges at Fayal, although it was never landed. It was said in the letter that the Frenchmen who came in her were frightened at the report of a war, and had sold ship and cargo to the Portuguese at Fayal. In case the ship should be taken by any hot-headed captain of a privateer, he recommends Caneoto, the master, to Sykes; so that Graham clearly apprehended the hazard of the ship being made a prize, and meant to protect it as well as he could. By this letter it did not appear, or by any public instruments, or other evidence, that Macedo or Ribeiro had purchased the cargo, nor who Ribeiro's partners were; and the letter of Graham appeared clearly to have been fabricated very early, as for a Lisbon voyage,

* although it was afterwards declared to be for Amsterdam [* 239] or Dunkirk. The fraud, indeed, was so palpable, that there was no way thought of for overturning the evidence of the master, but by attempting, after the examinations had been taken on the 19th of September, 1778, and were published and seen, to offer an affidavit and complaint of the master, Caneoto, so late as the 29th of December; and after a second claim had been given, November 11, by Am-sink, for Macedo and Ribeiro, objecting to the interpretation of his deposition to three interrogatories only; not, however, denying the truth of all the rest of his depositions, or that the whole of the interpretation was false; nor charging the commissioners, or interpreter, or actuary, with undue influence or corruption, nor even the interpreter with not understanding the Portuguese language; and the master prayed that he might be examined over again on the standing interrogatories. In this complaint the Portuguese master was not joined by his mate, or any one of his crew who were examined; nor did even La Confourgue join with him; but, on the contrary,

* the commissioners reported to the court that the evidence [* 240] was regularly and carefully taken, and affidavits were made by the interpreter and the actuary. By these it appeared that the deposition of the master was carefully and distinctly read over to him by an interpreter, in the presence of the commissioners and actuary, and as carefully explained to him before he signed it; that the interpreter was, as it is always done, sworn faithfully to interpret; that he was a native of Spain, and perfectly well acquainted with the Portuguese language (which is a dialect of the Spanish); that Caneoto

declared he thought himself happy to have met with a person who understood the Portuguese language so well, and actually employed him in several little affairs of his own, after the depositions were made; that the deposition was read by him three times over to Caneoto, before he signed it; and that he heavily complained of the conduct of La Confourgue, as the cause of all his misfortunes; lastly, that the interpreter, Mr. Harris, was a man of character and reputation, and a clergyman of the Romish church, and consequently * a false interpretation of the depositions of foreigners of his own persuasion, must have been ruinous to his interests and reputation. It was also remarkable that Caneoto's depositions, owning the cargo to be French property, were exactly fitted to the first claim given in the cause for the cargo generally, as privileged on board a Portuguese ship; implying it, therefore, *prima facie* to be French.

The case of the Monte Christi ships, which is a Spanish port near the French one of St. Domingo, was urged, in which the ships and cargoes were condemned upon appeals last war, whenever it appeared in evidence that there was a French supercargo on board. The whole, therefore, of this affair, appearing a fraud practised upon the Portuguese government, and intended to impose upon the British, and a manœuvre of La Confourgue, otherwise Jean Auger, assisted by the French and English consuls at Fayal, the judge condemned the ship as a French ship, and the cargo as French property; recommended it to the captor's generosity to let the mate, Lopez, who had given a very [* 242] fair and honest evidence, have * his chest and property, and to Pereira, the boatswain, his adventure of a little wine and a few fur skins. The master had been confined as a prisoner of war, under the idea of a person serving on board a French ship, but had been released by the favor of government.

The judge remarked how necessary it was become for the Court of Admiralty to look very strictly into the part taken by British merchants, when even a British consul had disgraced himself so much as to make a part of the machinery in this fraud; and that foreign ministers would do well to be very cautious how they suffered themselves to be teased and imposed upon by the false representations of the low people, masters of vessels, who resort to them, and who endeavor to make the most respectable characters in the *corps diplomatique* instruments of attempting to protect frauds upon both governments. Memorials are presented, ministers are drawn in to be agents; and instead of the decisions of causes in the regular course of justice being forwarded, as they otherwise would be, they become, [* 243] by the interference of ambassadors * and envoys, delayed,

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perplexed, and subjects of mutual complaints and distrust between courts the most friendly disposed to each other. It was clear that Caneoto, the Portuguese master, was tampered with by La Confourgue, after the depositions were seen.

There is reason to believe that the masters of many neutral vessels, when they get home, will be severely punished by their own governments, for having made representations deceiving their ministers at this court.

THE JEAN AND SAMUEL,

A DUTCH ship, bound from Nantz to Ostend, with innocent goods of French subjects; the privateer who took and detained her, on no better pretence than that there was an erasure in the French pass, was condemned in full costs and damages, and restitution decreed of ship and cargo.

THE DAME CATHARINE DE WORKEEM,

A DUTCH ship, laden with tobacco, from Bordeaux to Dieppe. Ship and cargo restored, * and the privateer condemned in all costs and damages. [* 244]

The judge observed that the duty of the captors was to produce the master of the captured, and others of the crew, agreeably to the articles of the king's instructions, immediately on coming into port, to the judge's commissioners, and to bring in all the ship's papers at the same time; and that if any master of a foreign ship is absurd, and refuses to deliver up all his papers, or will not be examined, then the captors are at the same time to make complaint of that fact to the commissioners, who are to report to the judge, and a monition is to be prayed against the neutral to compel the delivery of the papers, and his undergoing the examination preparatory to adjudication, agreeably to the common law of all Admiralty Courts in Europe; and such refusal being contumaciously persisted in, attachment and commitment to prison will follow for a contempt, with a loss of costs and damages, in case ships or cargoes should be restored to the owners, who must look to their own master for the loss of their expenses in that case.

* THE POSTILION,

[* 245]

A LUBEC ship, was restored to the Lubeckers, and the cargo to M.

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Lienau, the owner, who, though a Frenchman, was domiciled at Hamburg; and it appearing by evidence, and by a certificate of the magistrates on board the ship, that the cargo was his sole property, though consigned to his brothers in France, the cargo was also restored, and the privateer condemned in costs and damages. The ground of the decision was, that a native of Hamburg, resident in France, would have his property condemned by the law of nations as an adopted Frenchman, *pro hac vice*; and so the king's declaration of reprisals expresses it, that the ships and goods of persons inhabiting the territories of the French king shall be subject to reprisals; and therefore the same equity operates the other way, that a Frenchman, resident at Hamburg, should be considered as a Hamburger, and have the advantage of protection, if he is the sole proprietor.

JONGE GERTRUYDA,

A DUTCH naval store ship; the court restored ship with freight, and all reasonable expenses of the captor and claimant to be paid by his Majesty, and the cargo to be sold to his Majesty for the benefit of the claimant, on a fair valuation, by merchants to be named on each side.

[* 246]

THE PRUDENTIA,

A SWEDISH store ship, the same decree.



[* 247]

THE MARIA MAGDALENA,

January 11, 1779.

[Claims disallowed on facts.]

[What state of hostilities will make trading illegal.]¹

WAS a Swedish ship, taken by his Majesty's cutter, The Kite, upon the 26th of August, bound from the port of London to Nantz; she was laden by several merchants of French houses of eminence

¹ [The Eliza Ann, 1 Dod. 244.]

in London, and the cargo put on board between the 7th of July and the 21st of August; cleared and sailed out of the river Thames on the 24th of August, as appeared upon the evidence of the Swedish master and mate. Separate claims were given, and one of the claimants very honestly in his affidavit confessed, that if the goods got safe to Nantz they were to be French property, but if taken upon the high seas, then they were to be British property. This shows the artful manner in which merchants cover their trade with the enemy, and the necessity of parties being required to prove a continued and complete property for their own account and risk, at the time of their lading, at the time of their being taken, and at the time of their *unlading at the place of their final [* 248] destination. One of the claimants had made an affidavit, that his goods were shipped the beginning of August; but being deceived, as his counsel said, by his broker, he now made another affidavit, that they were shipped in July, on a day before his Majesty's declarations of reprisals, which was on the 29th of July. They all of them swore roundly, that their respective cargoes were shipped for Ostend, and it appeared by the evidence of the master, that the ship was never intended for, nor did it touch at Ostend; that he flung overboard all his English custom-house papers the moment he got out of the river. All the bills of lading were made out in the French language, and as of goods shipped at Ostend in foreign names of Arnoldus Hoys, and others. The counsel for the claimants urged, that the present state of hostilities was not such a state of war as to make British subjects liable to confiscation, or any other legal inconvenience, for holding correspondence with France; that nothing but a declaration of war could restrain the subject; but a declaration of reprisals went no *farther than to con- [* 249] fiscate the goods of enemies, and of others residing within their territories, under their protection and government, and not those of British subjects; if there was meant to have been a prohibition of that kind, it ought to have been expressed, to have put British merchants upon their guard; that it was well known in the commercial world, that by the laws of France British manufactures cannot be imported directly into France without an extraordinary duty, which duty is avoided by carrying them to Ostend, and from Ostend to French ports; that this trade, by connivance, is greatly for the advantage of England, and as such to be tolerated, being like to the profits acquired by insuring the goods of the enemy, and the balance in favor of this kingdom. That it appears by Rymer's *Fœdera* in the time of Edward the third, that commerce was allowed between English and French subjects, although the two kingdoms were

in a state of war; and that no prohibition can legally take place till there is a declaration of war, which, like that in 1752, forbids the subject to hold any kind of correspondence; that the [* 250] * packets to this moment sail between Dover and Calais; that it is not even clear that the French Minister, or his representative, have quitted this country; and an order of council for reprisals is not equal to a declaration of war in many respects, otherwise why does this court decree that naval stores, laden on board neutral vessels, before the time limited by his Majesty's notification, and destined for his enemies, should be sold to his Majesty for the benefit of the proprietors? To this it was answered, that the fact was clear on the part of the captors, that the ship had sailed a month after, in defiance of the king's declaration of reprisals, from the port of London to the port of an enemy. If such a trade was thought useful, upon a representation to his Majesty's government, passports and letters of safe conduct should be applied for, and licenses obtained. The master deposing that the bills of lading were all colorable and false, is a sufficient ground for condemnation. The present state of hostilities is a state of war, *de facto*, to all intents and purposes; and the parties claiming suffered the vessel [* 251] to sail a month after * the king's declaration, with their eyes open to all the consequences of such an act. In the case of *The Stadt Bergen*, in 1758, in *The Rengender Jacob*, and *The Notre Dame de Grace*, where British subjects claimed goods on board neutral ships destined for the ports of the enemy, the goods were condemned, upon this principle, that no claims can be admitted to contradict the ship's papers, and that English merchants shall not consign falsely; that the truth of the matter seems to be, that the present claimants are shippers and insurers for the French, but not ultimately and truly the owners: if they are the owners, such a trade is illegal.

The judge delivered his opinion as follows: The fact is, that merchants in England have cleared out a vessel in the river Thames falsely, and have furnished her with false bills of lading; and the English clearances have been destroyed. They have sworn most equivocally in their affidavits, that the goods were shipped for Ostend; whereas they were shipped in reality for Nantz, in France, the capital port for the rebel American trade. The several [* 252] parcels * of goods were put on board at different times, some before, and others entirely after his Majesty's declaration of general reprisals, on the 29th of July, against France. They could not but know also, being French houses, of the King of France declaring in terms, on the 10th of July, that he was engaged in

The Maria Magdalena. 1 H. & M.

actual hostilities with *England. This point has already been decided by the Admiralty Courts of both kingdoms. Where is the difference, whether a war is proclaimed by a herald at the Royal Exchange, with his trumpets, and on the Point Neuf at Paris, and by reading and affixing a printed paper on public buildings; or whether war is announced by royal ships, and whole fleets, at the mouths of cannon? The relative state of subjects as to foreign nations is that of their prince. It is a misdemeanor of a very high nature to carry on commerce with the enemies of the crown and kingdom. Confiscation here is one of the civil consequences of such a conduct. Metaphysical refinements about *bellum justum, perfectum, legitimum*, are ridiculous. If learned authorities are to be quoted, Bynkershoek has a whole chapter * to prove, from the history of Europe, that a lawful and perfect state of war may exist without proclamation. But it is said that this covered trade is politically useful for England and its manufactures; and the balance as favorable as insuring. I do not sit here to judge of political systems, or commercial ones, upon the subject of the greater or less degrees of possible profit and loss to the community. It is said that the returns will be made in French goods; that is, they will be smuggled into England: but at all events, between the trade of England and France, in the commutation of commodities, the balance is known to be greatly against England. In regard to insuring, (and I do not wonder at this argument coming from insurers,) I have a clear opinion, that as the insuring of his Majesty's life is not to be permitted, because it may be a temptation to some one to take it away; so insuring against the arms of the British nation is an inducement perpetually to betray them; it is an aiding, abetting, and comforting of the king's enemies, a discovery of the national councils, and a prolonging of the war, to the oppression, *tax- [* 254] ation, and ruin of millions of subjects; and instead of a great balance of profit in favor of the whole community, it is a less balance turned into the narrow channel of the pockets of a few private men, who, often without property, prey and grow great upon the public vitals. There seems little or no doubt but the claimants are insurers; not the ultimate owners, at all events; and the affidavit of one of the claimants clearly shows how the bargains are made between the shipper here by commission, and the consignee in France, as to the risk on the sea and on the land. How any man can swear, (and one only has ventured to swear so, besides the variations of his dates,) "that the goods, if they had been landed in France, would have continued his property," is astonishing: for it is clear that if they were English property, and had arrived in France,

they would have been condemned ; if they were to be free, they must be French. So that the fact, either way, stares the affidavit in the face. And these are merchants ! Not indeed true Englishmen ; for better would it be for England that Englishmen to [* 255] * Frenchmen should set foot to foot, than thus to protract a war with all the subtleties of mercantile negotiation and every refinement. What is this but *cauponantes bellum* ? carrying on war by retail ? I own I am shocked when I see the names of the claimants, and observe by the affidavits how little attention is paid to truth, and to the bond of all duties, public and private, the solemnity of an oath. Is the faith of a broker, and his report to his principals, or even his oath at a custom-house, to heal over the conscience of his employer ? But these are merchants !

Remitters, agents by commission, insurers of all things certain and uncertain, and the greatest enemies of this country and happy constitution, are found too often blended together in the general class of the denomination of merchants, assumed by men who are either born, or are dwelling and growing rich under the laws, liberties, and protection of Great Britain, without affection or attachment to it.

The true merchant, importer, and exporter, for his own account and risk, is a great character, and to be revered by all mankind, [* 256] * whose necessities are supplied by him, and the horrors even of war diminished. Such there still are, and who are men of the greatest probity, and worthy of the confidence of sovereigns, and of nations. I feel the utmost pain in this cause. I have a personal respect for some of the names I see in the claims and affidavits annexed, and am willing to be persuaded, that in the immense hurry of other business, or by the dissipation of the pleasures of the times, they have been led into a most dangerous error, in imagining that affidavits are nothing but forms, to be left to be settled by an attorney, a proctor, a clerk in office, or a counting-house ; they are made with levity, and sworn to with rashness. If such affidavits had appeared in any other court in this kingdom, the claimants would have been too sensible of the consequences of falsifications. Warned of their mistake and inattention here, they ought to be thankful for what is now said, to put them upon their guard from showing too much zeal for their correspondents in an enemy's country hereafter. The goods

must be condemned, and the freight and costs on all sides [* 257] * paid by the claimants. No contract appears with the neutral carrier ; they best know what it was, and for whom it was made. It is very reasonable that the master should pay the man.

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The proctor for the claimants protested of a grievance and appealing; but the appeal has been since withdrawn.

* THE KRONTA ANCHARET.

[* 258]

January 21, 1779.

A SWEDISH ship, bound from Bordeaux to Carlschron, in Sweden, taken by a private ship of war The Resolution. Lading tobacco, sugar, coffee, rice, prunes, wine, indigo, vinegar, almonds, oil, silk. Out of fifteen bills of lading one only expressed to be for the account and risk of Swedes. The court restored ship and master's adventure, with freight and all expenses to be charged equally upon the cargo, upon an average; and condemned the tobacco, sugar, and coffee, which appeared to be the produce of the French colonies, and to have acquittances for the account of French subjects, and also, the prunes, as French property; and directed the rest of the property, not being verified by the master's evidence and ship's papers, to be proved within a limited time.

LE THEODORE.

[National character proves residence.]

A FRENCH ship, bound from St. Domingo to Nantz. The ship was *condemned, together with a general cargo, as [* 259] French property, upon a former court-day, reserving the question concerning the claims of two passengers on board the ship. These claims were given by Israel Moses, a Jew, who asserted himself to be a native of Prague in Bohemia, a subject of the Emperor of Germany; and Joseph Molo, another Jew, who asserted himself to be a native of Milan, a subject of the Grand Duke of Tuscany, for several sums of money, jewels, trinkets, and clothes, their property. Affidavits were annexed to their claims, tending to show ill-behavior in the owners of the privateer. After the captain of the privateer had told them that they were at liberty to take their boxes and bags, the owners and the brother of the captain, insisted upon examining the contents, and did accordingly take each of them separately into a room, after they were landed, and opened the drawers, stripped them naked, to see if they had any concealed jewels about them, and changed their clothes,

by giving them others out of the bag. But there was no charge of any other ill-treatment; and it seemed that the captain of [* 260] * the privateer had no idea of the value which has since appeared, according to the description of the particulars given in by the Jews, in their claims to be very great. It appeared that the owners having, as it is; most likely, got some information of the contents, used the following stratagem: they invited the Jews to dine with them at a public house, and after dinner some persons in company desired the Jews to show them some artificial serpents, which they did; by which means a discovery was made.

It appeared, by their own affidavits, that Molo, two years before, went to St. Domingo to reside as a merchant, and that Israel Moses had been eighteen months there on the same account; nor did they set forth that their wives and families were fixed in any part of Europe. And further, it appeared by the certificate of the French governor, and register on board the ship, that they were described as inhabitants of the French Cape. There was not the least doubt of their identity. The judge rejected the claims on this ground, [* 261] that if such claims were to be admitted, there * would be no end of concealments, and of covering the property of enemies. That the colonies of the several maritime powers of Europe are full of renegadoes of all nations; that at a time when men run to and fro upon the earth, as in the language of the book, many persons seem to be without any country; and therefore the nationality of a character of a person taken in war, is with more peculiar propriety determined by the locality in the age we live in. This was at all times the doctrine of the law of nations. An Englishman, resident in the French colonies as a merchant, and going, as these Jews were, to a French port, and in a French ship, would have been equally liable to have his property on board condemned. Jews have as much right to public justice as other men, and in no country do they enjoy the benefits of the civil rights of humanity more amply than in Great Britain; but they cannot expect to have a privilege greater than that which a British subject would be allowed to claim.

The principle of the law of nations is, that where the protection and power are, there is the subjection. If these persons had [* 262] * absolutely derelicted all inhabitancy in the colonies and territories of the King of France, and it had appeared that there was neither an intention nor a possibility of their returning thither again, the analogy of the case of the exiled Americans might have been set up as better argument in their favor, although even that case would not be exactly parallel. That the supposed case urged by the counsel for the claimants of a French merchant on board a neu-

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tral ship coming from the East Indies, with a bag of diamonds in his personal custody, is by no means a good argument, no not even on board a Dutch ship. For even Dutch ships cannot protect the property of enemies beyond the limited line of commerce in Europe. Admit the principle of itinerant Jews being privileged to carry free what they may swear to be their property about their persons, what will hinder but that a Jew should transport in a pack at his back, a million in diamonds, the property of the enemy? If this were admitted, the whole trade of any maritime powers at war in America and the East Indies might fall * into the hands of Jews, [* 263] and pass safe through that channel.

The determination in the case of *The William and Grace*,¹ by a late most respectable authority in this place, is fresh in memory. A Jew pretended to have gone from Holland to the rebel colonies to collect his debts, and to have invested them in the purchase of the ship and cargo, but the court rejected the claim. The present claimants, at the time of their taking, were so far from having quitted the protection of the French government, that they were taken actually under its protection, being as much subject to the French laws, by being found on board a ship of France, and destined to a port in France, as if they had been taken prisoners of war in an attack made by British forces upon the place of their actual habitation at St. Domingo. On the other hand, the previous question, of their having no right to enter a claim, started by the captors, on the ground of their being French inhabitants, and so not having by law a *persona standi in judicio*, was no just objection, because it is one thing to admit a claim to be read and * argued, and another thing to [* 264] pronounce in favor of the right asserted. In a court of admiralty, Jews, Turks, infidels, and heretics, are to have justice. His most Christian Majesty has been heard already with all possible attention and respect, when the same objection was started and overruled. In regard to the conduct of the captors, there is not the least charge of any cruelty inflicted upon the persons of the claimants; they thought indeed that the laced and embroidered clothes were rather unnecessary, and gave them others, which altogether must have been no very shabby collection, otherwise they would not have transported it so far. No pilfering has been charged or proved; one of the Jews says, that a pin, in which was a broken diamond, was given to the maid of the inn; but he does not say whether it was given by himself, or by the captors, or for what. It is the first time

¹ Hay & Marr. 76.

a broken diamond was ever heard of. A diamond cannot be broke, any more than it can be fused or melted. By this one may judge of the real value of the trinkets rated at so great an amount by the Jew in his affidavit, and what sort of diamonds his box contained. [*265] * So far from ill-using the Jews, they themselves prove that the captors treated them handsomely, walked friendly with them about the town of Jersey, and gave them a good dinner. If any torture or cruelty, or any violent act upon their persons had been charged and proved, this court would have redressed the injury. The consequence to the captors would have been the forfeiture of their commission and security, and the restitution of the goods claimed; but nothing of that kind appears, either from the affidavit of the parties themselves, or from any evidence of the French captain, officers, crew, or any of the passengers. One alone, Mons. Porteau, says, that, in company with one of the Jews, he looked in at a window, and saw them searching the other Jew; and that they threatened them, and bid them keep at a distance till the search was over; he also swore, that they had paid the French captain for their passage, and that the captain had given them a receipt; therefore, as it is natural to suppose that the receipt must have been for the passage of their goods, if they had any thing considerable, as [*266] well * as for their persons, the claimants not producing such receipt, it has raised a very high presumption that the jewels and fine clothes in reality belonged to other French persons on board, especially as there was a lady, with her children and servants, and several military officers in the ship. It also seems very absurd to say that such clothes and ornaments, jewels and trinkets, were going, in the way of trade, to France; because it is as unnatural to bring from the French American colonies, bijoux, &c., to Europe, particularly to France back again, as it would be to carry logs to the wood. There is little doubt, therefore, upon the whole, that these sort of things belonged to some French family or persons; but whether they did or did not, and were the property of the Jew claimants, who were to be considered as Frenchmen, *pro hac vice*, the goods claimed must be condemned. The court could not help calling to mind the hard case of Admiral Young, then a captain in a former war, when, after a cargo had been condemned on board an Italian ship, and the value distributed by Captain Young among his officers and sea- [*267] men, an * appeal to the king and council being entered on the part of Turkish subjects, as they called themselves, and representations made by the Ottoman Porte, threatening to seize the goods of the English Turkey company, the sentence of condemnation of the Court of Admiralty was reversed, and Captain Young

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obliged to refund the value to a very great amount, and all the expenses, out of his own property ; all which has since been discovered to have been an imposition upon the British government at that time, and that the real owners were French merchants, well known at Leghorn, and the manœuvre set on foot at Constantinople by the intrigues of the French ambassador.

CONCORDIA SOPHIA,

A HAMBURGER ship, from Hamburg to Bordeaux, laden with copper sheets and other goods. Court restored the ship to the Hamburgers, the owners, with freight and all expenses charged on the cargo. The copper sheets fit for sheathing, to be sold to his Majesty, on a fair valuation, for the benefit of those who should appear to * have a right ; and directed that the claimants of the cargo, [* 268] not being verified by the evidence of the master and ship's papers, should enter into farther proof of their property.

THE JUFFROW GERARDA,

[* 269]

January 23, 1779.

A DUTCH ship, bound from Rotterdam to Havre de Grace, cargo tobacco, bundles of iron, lead, and bale goods, taken by the private ship of war The Joseph. The captor attempted to prove, in mitigation of costs and damages, that the master refused to produce his passport. The court observed, that although neutral masters are very apt to be guilty of obstinacy and absurdity, to the prejudice of their owners, yet in this case Stoffels, the master, was not in fault, for he had deposed upon oath, that he had produced all his ship's papers to the prize-master, who took only the bills of lading, and returned the rest. It appeared that the ship was taken on the 10th of September, 1778 ; and that the captor never produced the master to be examined by the commissioners till the 25th of November ; and he swore that he offered his papers, not before delivered up, to the privateer's people, at the house in Dover where they were ; that they * would not take any of them ; the delay therefore ap- [* 270] peared clearly from the date of the monition and examinations to have been occasioned by the captors. It is as much the duty and interest of every party who stops a neutral ship, to demand a sight of a passport, as it is the duty and interest of a neutral to produce it whensoever and wheresoever duly required. A party com-

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missioned, and cruising against an enemy, is like a sentinel; he has a right, and ought to put the question, *Qui va la?* or, "Who goes there?" The party who does not properly answer to a sentinel, may justly be stopped, detained at the guard-house, or carried to headquarters. The conduct of the Dutch captain appearing perfectly fair, the judge restored the ship and cargo, and condemned the captor in full costs and damages.

THE DRIE GEBROEDERS,

BOUND from Hamburg to Rouen in France, taken by the private ship of war The Two Brothers, laden with pitch, tar, lead, wool, feathers, copper, and other merchandise. Among the ship's [* 271] papers * were only two bills of lading, which mentioned for whose account and risk the goods were; these were bales of wool for the account and risk of Mr. Grettel, and there was a certificate of the magistrates of Hamburg found on board, that Grettel had made an attestation, in a due manner, before them, of their being his property; but the attestation itself was not on board; the master did not verify upon oath the property of any of the goods on board, and only referred to the bills of lading. The court therefore decreed, that the ship should be restored, with freight and expenses, to the master, as claimed by him, for himself as part-owner, and for others, inhabitants of Hamburg, and of Altena in Denmark; directed the pitch and tar, and copper fit for sheathing, to be sold to his Majesty's commissioners of the navy, for the use of those who should be entitled; directed further proof to be made of the property of the several goods not yet restored, chargeable with the freight and expenses on all sides for defect of verification.

[* 272]

* THE JONGE JUFFERS, Reetsma.

A DUTCH ship, decreed to be restored upon the 23d of November last, whensoever a legal claim should be given for the same; and that the cargo, consisting of naval stores, should be sold to the commissioners of his Majesty's navy, they undertaking to pay the true value thereof, and all incidental charges, to the parties who should appear to have right. A claim being now given in, the ship was restored, and the decree affirmed accordingly. The court observing upon the indulgence of the British government towards the Dutch

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subjects, notwithstanding the delay and long dereliction on their part, by which the demurrage was considerably increased, and would be accordingly considered; for that by incidental expenses must be understood all reasonable expenses incurred, and would make a part of the award of the valuation and charges to be allowed, by merchants named on either side.

JUNGFRE MARIA.

[*273]

January 28, 1779.

[A case of further proof. Master's expenses a charge on the cargo.]

A DANISH ship, bound from Barcelona, in Spain, to Honfleur, in France, with a cargo of brandy and alum, taken by the private ship of war *The Wasp*, upon the 27th of October. The master claimed the ship as Danish property, and the cargo as free on board a Danish ship. Several claims were given by Mr. Zinck, the Danish vice-consul at Liverpool, for the cargo, as the property of Manuel Cardenas, Narcisso Bas, Valentine Reira & Co., Gaffet Morera & Co., of Barcelona, subjects of the King of Spain. This ship was a general carrier ship, upon freight. The master, Christian Degan, being questioned upon the usual interrogatory concerning the property of the cargo, referred to his bills of lading; but declared that he believed that the persons at Honfleur, (the French consignees,) who were to receive the cargo, were the real and true owners of the several parcels of the cargo consigned to them, but could not say who in particular * of them were to run the risk; and gave for a [*274] reason of his belief, that the French consignees were to pay him his freight. Axtel, the ship's carpenter, declared his belief that the brandy was sold by the Spaniards for the risk of the French at Honfleur. Another of the Danish seamen swore that he believed, but could not positively swear, that the cargo was French property. By two charter-parties on board, it appeared that the French were freighters, and were responsible to the master for the freight. The ship had no Danish pass, as required by treaty, but only a Mediterranean pass, and there were twenty-five bills of lading, not one of them expressing upon whose account and risk the cargo was laden. The ship was taken the 3d of September 1778, and the witnesses were examined the 16th and 17th of September following. After

the evidence was published, Zinck, who had already given in two claims with affidavits annexed, now appeared again; and so late as the 9th of December, that is near three months after the examinations were known, gave in a third claim, and accompanied [*275] it with an *affidavit containing very new and extraordinary matter, setting forth that he was present at the examination of the master, Degan, before the commissioners of the judge at Liverpool; that he thought it was on the 16th of September; and that Degan, instead of saying as it was taken down in his deposition as above recited, had answered that he did not know whether the property of the cargo was French or Spanish; that he, Zinck, interfered, and expressed his wonder to the commissioners that they would tease the man with so many questions of what the man knew nothing about. On which the commissioners ordered Zinck to withdraw.

In answer to this affidavit of Zinck, the commissioners returned affidavits to the court, setting forth that Zinck was not present on the 16th, when Degan was examined to that part of his deposition which Zinck objected to; but was present on the 17th, when he was examined to other parts; and that Zinck was so far from objecting then, that Degan, being scrupulous about signing his deposition, [*276] he did not do it till Kenyon, one of the owners *of the privateer, brought Zinck into the room to inform Degan that it was proper he should sign his own deposition, and then he signed it, Zinck saying that he would sign it himself. Mr. Eggers, a Dane, and sworn interpreter, declared in his affidavit that he put all the questions to Degan in the Danish language; that he heard Zinck talk with the Danish captain, Degan, in Danish, during the time of part of his examination, and told him that he was to sign nothing but in his presence, and intimidated the witness by bidding him take care lest he should get himself into a scrape. Eggers informed the commissioners of this conversation, and they rebuked Zinck for his improper behavior. Two affidavits, dated the 28d of January, were offered, made by the Danish captain, Degan, and his brother, to falsify their own depositions. The captors brought in an affidavit of M. Frederic Axholm, an officer of the Danish navy, who was learning navigation on board this ship, who was at Barcelona at the time of her lading there, and in her at the time of her being taken; he swore that in conversation with the Spaniards, (the laders,) [*277] *they directed the master to avoid the English cruisers. Another affidavit was also offered by the captors, made by Kenyon, one of the owners of the privateer, confirming the fact alleged in the affidavit of the commissioners, that Zinck was fetched by

him into the room; and that Zinck perused the deposition of Degan, &c.

The judge decreed that the ship, being clearly Danish property, should be restored to the master, with freight and his expenses; and, with respect to the rest, observed that all sides were wrong; that the affidavit of Axholm was inadmissible; for if the captors meant to have had any advantage from his evidence, they should have produced him regularly at the first, to be examined on the usual standing interrogatories, at the same time with the Danish captain and the rest; that Kenyon's evidence, also, as an owner of the privateer, was inadmissible; and the commissioners were very highly to be censured for taking the affidavit of Axholm, in a manner contrary to the rules of the court, and the king's instructions; that the evidence of the notary public, and of Eggers, the * sworn Danish interpreter, and the report of the commissioners, [* 278] upon oath, against whom there was not the least impeachment of probity, weighed down all Zinck had affirmed on oath. The character of consuls is most respectable; they are public persons, and a sort of ministers sent by one nation, approved and accepted by another, but without the privileges attached to ministers with credentials. They have a kind of judicial authority among the merchants, and masters and crews of vessels of their own nation, submitting themselves to them by consent, or by the commercial laws of their own country, in mercantile matters of dispute and regulations; and they have what is called their chancery, that is, an office of registry and record, and their certificates are authentic in *foro domestico*. But Mr. Zinck has evidently descended from the respectability of his character as vice-consul, if he is one. It appears clearly that he prompted and intimidated a witness, and interfered in a very improper manner, before commissioners who represent this court. His zeal and sedulity, however, obtained him afterwards the agency in all the claims; but it was * only till the last claim [* 279] that he found it necessary to make the affidavit to falsify the master's deposition. Consuls are not very easily admitted by government, and are men often objectionable and disagreeable to the resident ministers of their own country here, whom they frequently interfere with, and as often embarrass. Vice-consuls are still less acceptable. Mr. Zinck's authority as vice-consul, admitted and confirmed by this government, does not appear. He is not the only vice-consul in the out-ports who has embroiled matters. Agencies are very fine things; but it must be observed that there is a consul, agent in causes of a neighboring kingdom to Denmark, whose attention, prudence, and moderation do him the highest credit. In this matter,

the court will look chiefly into the report of its own commissioners. No objection whatsoever is taken by Zinck to the evidence of the Danish carpenter, Axtel, nor to Eggers, to affect his knowledge of the language, or his character; or that any undue influence was used to him, or the notary, or commissioners. The commissioners admit that the Danish

captain did not swear positively to the property being French, [* 280] and the foundation * of the master's opinion appears from

his deposition, that he believed the cargo to be French property, because the French consignees were to pay him his freight. Now the master's opinion is not his knowledge; and he might reason wrong, and draw false consequences and conclusions from true premises. It is natural enough for a master of a common carrier ship to reason no farther than the question, "Who is to pay me?" "The last man you see and have to do with," is the answer. "The laders you may never see any more, (and to them you do not recur,) but where you deliver the goods, there the receivers shall pay; but upon whose real account they shall pay is not clear to you, nor is it any matter to you." The master's deduction, therefore, is not certain; but a plain, honest man might easily make it. The reason given in the deposition, and the report of the commissioners, reduce the deposition of the master to this, that he does not absolutely know, and that he cannot verify the property one way or other farther than his judgment goes. The subsequent affidavit of the master,

[* 281] and of his brother, to falsify * their written evidence, which was read over to them, and explained by a sworn Danish interpreter, is inadmissible. When the master gave in his claim, under the notion of Danish ships being privileged carriers, he deposed rather boldly to French property; but after the event of a judgment in several cases against the privilege, he and the Danish agent took the alarm. The Danish officer's affidavit, if it had been admissible, amounts to nothing but hearsay, that the Spaniards at Barcelona advised the master to keep clear of the English cruisers. This was but hearsay; the talkers might be Spaniards, concerned or not concerned in the lading or cargo, or mere conversation of anybody; and it was natural, when a war was expected. The cruisers of all maritime nations in hostility are to be avoided by a prudent master of a neutral common carrier ship. Besides all this, the cargo, for which the bills of lading are defective, was put on board so early as the 11th of July; the ship sailed from Barcelona on the 23d, and on the 4th of August she touched at Gibraltar; so the laders could have

[* 282] no knowledge or suspicion of hostilities declared * by either France or England. For these reasons the Spanish claimants are to be indulged with a permission to go into farther proof of

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their property. The seizure is justified under the defective bills of lading, and the Spanish property not being verified, but doubted by the master and the rest of the witnesses on board the ship. The neutral, however, must be taken care of; and therefore, that he may have a sure fund to rely upon, his freight and expenses must be a charge on the whole cargo in this, as in other like cases, when there are defective bills of lading and documents, and the master cannot or will not swear to the property being neutral, at the time of lading, taking, or delivery. It is to be wished that this charging expenses on the cargo should be well understood by the neutral agents present, for it is frequently mistaken, and the spirit of perplexity, whether wilful or natural, is greater among us all than the spirit of perspicuity.

By the law and practice of this Court of Admiralty, which in these cases, even in the severest times, has been always infinitely more gentle than the arbitrary severities of *the French [*283] courts in the like cases, for which we need only look into their *Reglemens*, instead of condemning neutral ships instantly, when the bills of lading or of sale, passes, or other documents of ships and cargoes, are either wanting or defective in their contents, the court has pronounced just cause of seizure, in favor of the conduct of the captor; and because the claimant himself has not put on board due titles or documents, he has raised a violent suspicion and presumption of enemy's property by his own default, and therefore the permitting him to go into farther proof, and to produce better and sufficient titles, is a very great lenity and indulgence; an increase of delay and expense all originating from his own act, for which he is answerable. In the last war, the master was the general claimant for himself and everybody concerned; and in cases of further proof being decreed of the cargo, he used to be condemned in the expenses, and so he was left to recover them again of the freighters when he got home. They and the insurers were commonly too hard for the master, and if their goods were condemned at last, *they [*284] flung some blame upon his conduct, especially if he had made an honest deposition to their prejudice; so that the poor neutral carrier, the fund being out of his reach, got nothing but a right to go to law in vain with different inhabitants of half the world, to recover his freight and charges. The French owners, in particular, of cargoes, never repaid the Dutch carriers, who almost all of them in the last war fell under this unfortunate predicament of just cause of seizure and expenses; and hence arose the cries of misery of the Dutch and all other the neutral carriers, on account of this court, which complaints were in fact to be charged to the perfidy of the French, who freighted them. In order, therefore, to preserve the inte-

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rests of the honest neutral carriers, and to guard them against prevarications of friends and foes, as much as possible, it is most advisable and equitable, when neutral ships are restored, to charge the freight and expenses of the master upon the cargo, by which is meant an average charge; so that, let the last event of the cause be what it may, he is certain of a solid fund. If the whole or part of

[* 285] the * cargo shall be condemned, the captor will pay his share of the freight and expenses due to the master. If the whole or part shall be restored, the claimant will then pay his share; and if any burden is flung anywhere, in case the whole should be restored, the captor will still pay his own expenses. This is an unusual lenity to claimants; for in former wars, whenever there was just cause of seizure, the captors' expenses were all to be paid by the prover. As it is now settled, it is hoped, beyond the possibility of the meaning of the court being mistaken, but by those who choose to misunderstand it, the neutral gets immediately his ship discharged; he goes away in good humor, and we stand a chance of seeing him here again. The Dutch East Frieslanders, the Swedes, Danes, and Hanse Townsmen, are the great carriers of Europe. The former have furnished us with the greatest part of our transports to America. The carrier masters are most of them good, plain, honest men. When the scale hangs equal in judgment between them and an Englishman, it is the duty and it is the disposition of this court to turn

[* 286] it in favor * of the neutrals, so long as they do not prevaricate or conceal. Let the French courts proceed as they may; we may appeal to the *Reglemens* published by the French government in the two last wars, and in the present hostilities, announced arbitrarily to all Europe, for the difference of treatment. We will take care of the honest neutral, who shall never suffer while this court can help him.



[* 287]

* February 2, 1779.

HEARD thirty-four causes of naval store ships, chiefly Dutch. The neutral store ships were all restored with freight, and all reasonable expenses of the claimant and captor, and the stores were decreed to be sold upon a fair valuation, by merchants to be named on each side, for the use of his Majesty's navy, to be paid to the neutral claimants.

The question upon the property was reserved for farther consideration, in two or three cases, in which British subjects were the laders, or the King of France the declared owner; or where the ship-timber was fabricated into knees, bowsprits, &c., and in those cases the ships were released in like manner, all freight and expenses to be charged to the buyers, and the money to be brought into court for the benefit of all parties who should be proved to have right.

The judge spoke with much severity on the part taken by British merchants in aiding the enemies of their country; that no naturalization in a foreign state can * absolve them of their [* 288] allegiance, whenever their persons or their properties shall come within the vortex or reach of the power of British laws. That the Dutch have no privilege to carry the property of Englishmen to the enemies of England. The proctors for some of the neutrals entered protests against the decree of sale; but the judge observed, that no persons could be at the bottom of these protests except real French owners, or rather the French government; for neither insurers, masters nor owners, could be sufferers, nor indeed ordinary Frenchmen, He added, that there was a peculiar absurdity in neutrals appealing to his Majesty in council against a decree of sale exactly squaring with his Majesty's own declaration, formed and settled in council and notified to the Dutch states, and all the rest of the neutral maritime powers. He warned them, as a friend to honest neutrals, not to incur a fruitless expense, to beware of factious and rash advice, and to take the opinions of their own advocates in every step.

* CONCORDIA AFFINITATIS.

[* 289]

February 8, 1779.

THIS was a Swedish ship, bound from Hamburg to Rochelle. Upon the 27th of November last, the ship was restored, with freight and the master's expenses charged upon the cargo.¹ The hemp and copper sheets were ordered to be sold to the commissioners of his Majesty's navy, the money to be brought into the registry, for the use of those who shall be entitled thereto; and the claimants of the cargo in general (the property not being verified by the master, or

¹ [Hay & M. 169.]

fully set forth in the bills of lading) were ordered to prove their property. The captors consented to accept of affidavits as proof, without going into pleadings. A great number of affidavits were accordingly brought in. Out of fourteen there were but three numbers which were unequivocal and direct. The court restored the contents of these three bills of lading, and ordered that the claimants should give fuller proof of the property of all the rest:

[* 290] * The objections taken by the counsel for the captors were, that many of the affidavits were only in the present tense, viz., that the goods claimed are solely and wholly the property of claimants, and that no other person hath any share or interest therein: whereas it ought to have been sworn, not only that the goods were their entire and sole property at the time of the lading, at the time of their being taken as prize, and are so at the present time, but also will remain so in case the ship shall arrive at the place of her original destination. One of the claimants swore, that the hemp does go over the sea for his account and risk. Another swore that the goods are insured at Hamburgh and Amsterdam, and thus (drawing an inference) subjects of neutral states actually run the risk thereof. The case of *The Charles Havernersworth*, in 1748, was quoted. That was a Swedish ship, which had taken in goods upon general freight at Hamburg for Alicant, Cadiz, and Marseilles, by the bills of lading, to be delivered to the persons to whom the goods were consigned. There were attestations on board the ship con-

[* 291] cerning the property, and to them exceptions * were taken as in the present, that they related to the property at the time of shipping only. The court ordered fuller proof; and the mode of making it to be settled and agreed by the advocates on all sides by reference; Dr. Paul, the King's Advocate, Sir George Lee, Sir Ed. Simpson, Dr. Pinfold, Sir George Hay, Dr. Jenner, and the rest of the bar of civilians. They upon reference reported, that affidavits should be made by the claimants that the goods were their sole and entire property at the time of their shipping, continued to be so at the time of the capture, and would continue so until the goods should be sold by their agents in France and Spain for their account. This form was exactly corresponding to the latter part of the 12th of the standing interrogatories. It was urged, that affidavits being now made and insufficient, the court should condemn. The judge observed, that the affidavits were all made, and bore date in November previous to his decree on the 27th; that although it was true that a line must be drawn in every cause after a certain period

to exclude all further proof, otherwise causes would be immortal, yet he would allow farther time to the claimants *

[* 292]

make affidavits in proper form; as they made these before they knew what forms were required of them; that it would be very dangerous to admit such general affidavits; and that it was a very suspicious circumstance, that the same notary who had drawn the affidavits for the goods in the bills of lading, C. G. N., which were sufficiently full, (and so it was clear, therefore, from them, that he knew the forms that were proper,) was the drawer of the eleven affidavits, one of which only spoke to the property of the goods while going over the sea, thereby raising an implication that they were the enemy's when they should arrive at land; or arguing, that by the insurers being neutrals they were therefore for neutral risk. This shows the propriety of the words account and risk, and the wisdom of the 12th interrogatory; for goods may, especially since policies of insurance have become general, be for one man's account that are not for his risk, or for a man's risk which are not for his account. The very idea of complete and perfect property is perpetuity; that what was mine yesterday is mine to-day, and * will be so [*293] to-morrow, and every day until I assign it over, or make delivery of it for some due consideration to another person. The word *proprius*, in the classics, means perpetual; thus in Terence, "*ut hæc mihi propria sit felicitas*:" may this happiness continue mine; that is, long and lasting. It was not until the case of *The Charles Havernersworth*, that affidavits were ever admitted by the practice of the Admiralty Court, but as *semiplena probatio* only; and then they were admitted as sufficient by consent.

The claimants used to go into farther pleadings and proofs, and the captors had liberty to plead in contradiction, and to have cross-examinations. The same distress and difficulty dwelt on the mind of the judge then as it does now. The going into pleadings and proofs is one of the most difficult points of adjudication in causes of prize. He felt the great inconvenience, expense, and delay of this proceeding; but it is easier often to see an evil in the practice of a court, than to find a remedy that has no objection, or may not lead to worse consequences. With respect to great names, * that have done honor to their profession, it must be ob- [*294] served, that it would be dangerous to point out too exactly and invariably the forms of affidavits. Invariable forms are advantageous instruments for fraud to make use of. It will be sufficient to say, that wherever farther proof is indulged to claimants upon affidavits, those attestations must be without equivocality, and they must go to the property of goods at the periods when first laden, when taken, and when finally landed; and they ought to be negative as well as affirmative, that no enemies of the crown of Great Britain,

or its subjects trading with its enemies, had, have, or will have, at any of those times, any right, share, title, or interest therein, directly or indirectly, without fraud, collusion, equivocation, or mental reservation. The claimants on the whole are recommended to consider well what they can truly swear to, and advise with their advocates as to the forms of their affidavits and proofs.

[* 295] * LA PROSPERITE, or the WELFAREN.

February 19, 1779.

LEVIEN Gotthard Matheisen, master. This ship was a ship upon freight, chartered by a French broker for the laders resident at Nantz, taken on her voyage from Nantz to Dunkirk by the private ship of war The Tyger, the 25th of August last. The ship was originally claimed by the master, the property of himself and other inhabitants of the free imperial city of Lubeck, and the cargo in a general way on behalf of the several persons who may appear to be interested therein. The cargo consisted of brandy, linen, coffee, and cotton-wool, and ten bales of silk East India handkerchiefs.

On the 30th of October a claim was given in for Martinus Tak, a Dutch subject, for ten bales of Chollet handkerchiefs; but the master declared, in his deposition, that he did not know the laders, owners, or consignees; that he should have landed the whole of his cargo at Dunkirk had he arrived there safe, which is all he knew of the pro-

[* 296] perty. * All the bills of lading were defective in not expressing upon whose account and risk the several parts of the cargo were shipped; and several referred to acquittances under bond, of which the captain was therein declared to be the bearer. November 27, the court restored the ship as the property of Lubeckers, with freight and expenses of the master to be charged upon the cargo; and decreed farther proof of property to be made by all parties who might have interest. No other claims being given in, the cause came on to be heard upon farther proof of property, by affidavits, with consent of parties.

In regard to Martinus Tak, a certificate was offered, made by the magistrates of Middleburgh, of Zealand in Holland, dated December 17, 1778, setting forth that Tak, being of the Minonite persuasion of religion, (a sort of Quakers,) had solemnly affirmed before them, that

La Prosperite. 1 H. & M.

the Chollet handkerchiefs were his own goods at the time they were laden, and continue to be his true property to this present time, and so they were belonging to him in full property at the time the ship was taken as *prize, and will be, at the time of [*297] their arrival here at Middleburgh; that they were the same as in the bills of lading; and that the King of France, his vassals or subjects, or inhabitants of that country, territories or dominions, never had, neither have they at this present time, any share or property; but not a word was said as to the Americans or British subjects not being interested.

The equivocality of this declaration of the Menonite Dutchman was obvious on the face of it; for he sinks all declaration as to whose property the handkerchiefs would have been, in case they had arrived at Dunkirk, the real place of their destination, from whence it is most likely they were meant to have been run into England; and against this declaration stood the bill of lading, No. 46, which indeed mentions the handkerchiefs as going for the account of Tak, (but names not risk,) with an acquittance under bond for duties, of which the captain is there said to be the bearer. Now it is clear, that neither the captain produced the acquittances, nor did Tak offer them in proof; and therefore the *court observed, that here [*298] was plainly a fraudulent subduction of documents proved by the bills of lading to have been in the master's possession; that if the acquittances had been produced by either him or Tak, which were granted under bond to perform all that was required by the laws of France, they would have shown whether Frenchmen or Dutchmen were the responsible men, and the real proprietors, from the beginning to the end of the voyage. On the part of Messrs. Dutihl, of Rotterdam, no better proof was offered than their agent's, Mr. Amsiuk's affidavit annexed originally to his claim, with some letters, and duplicates of the bills of lading, which he swore were transmitted to him by his parties; and he believed (in the usual style of affidavits annexed to all claims) that the claim was true, and that his parties would be able to make due specification. These letters and duplicates of the defective bill of lading already before the court, mention account, but not risk, of Dutihl; therefore, not being accompanied with any proofs of their authenticity upon oath, and being besides very equivocal in their *contents, are rejected by the court; the claim- [*299] ants having time enough, since the 27th of November last, to have made fuller and sufficient proof.

The coffee for which Devet has offered proof, by affidavit made before the magistrates of Ostend, expresses that it was destined for Ostend, whereas by the master's deposition the whole cargo was

destined for Dunkirk ; and the affidavit is a farther averment against the bills of lading, by which it appears that the coffee was acquitted and bonded under the duties, although the acquittances are not produced. Now in *The Wynberg* and other ships it was in proof, that all the French coffee is by the laws of France reexported, a drawback on the duties allowed to the French reexporter greater than to any foreigner, and the reexporter gives bond to deliver the same at the place of destination, otherwise for default of the certificate returned authenticated by the French consul or magistrates, to pay the King of France the value.

In regard to the proof of *Rocca* and *Battle*, said to be Spanish subjects, it amounted to no more than a notarial certificate [* 300] of a *notary at Barcelona, that they had shown him an invoice book, in which was an invoice of ten pipes of brandy, shipped in that port upon a Dutch ship called *The Union*, Captain *Jacob Boon*, for *Nantz*, consigned to Messrs. *Th. Welfecherin & Co.*, to sell for their account; and in case they could not sell them at *Nantz*, to let them go to Dunkirk, which they did, as appeared (and so it was alleged by the parties making this declaration) by the account of charges, dated the 14th of October, sent by *Welfecherin* to the declarers, having shipped them (as is also alleged) on board *The Prosperity*, Captain *Mathiesen* of *Lubec*, to the consignment of *Tranion Devin* of Dunkirk. He is called *Tranz De Vink* in the bill of lading, No. 48. To this proof objection was taken, that it was only an instrument of a notary reciting allegations of parties interested, but it did not show that their declaration was upon oath. But on consideration that this declaration and notarial instrument was made on

the 6th of September, long before the cause was first heard [* 301] on the 27th of November following, *and previous to the order made for farther proof, the court directed that *Rocca* and *Battle* should now make farther and fuller proof upon oath of their property. And in regard to all the rest of the cargo, the cotton, and coffee, for which no claims were made, but acquittances under bond appeared to have been given by the French laders, and the handkerchiefs, for which it appeared that acquittances had been given, and that the captain was the bearer, but that they had been subducted, they were to be condemned ; also the brandy, for which there was not sufficient proof made by *Dutihl*. The court observed that the whole cargo carried with it the appearance of a smuggling transaction. If parties equivocate, or do not make oath in their own person, or produce those material documents which clearly did exist on board, or must be now in their hands, it is unnecessary to inquire what the nature of those acquittances was ; for it must be presumed

that they were made out for the enemy and his property; otherwise why conceal or subduct them? No affidavits of property can aver against a * positive proof of subduction of titles on [* 302] board the ship, and which were in custody of the master, especially such titles being public instruments.

*Reglément de la Cour de France, en date du 26 Juillet, [* 303] [1778,] concernant la navigation des bâtimens neutres en tems de guerre.*

LE ROI s'étant fait représenter les anciens règlemens concernant la navigation des vaisseaux neutres pendant la guerre, Sa Maj. a jugé à propos d'en renouveler les dispositions, et d'y ajouter celles qui lui ont paru les plus capables des conserver les droits des puissances neutres, et les intérêts de leurs sujets, sans néanmoins autoriser l'abus, que l'on pourroit faire de leur pavillon : et en consequence Sa Maj. a ordonné et ordonne ce qui suit.

ARTICLE I.

Fait defenses S. M. à tous armateurs d'arrêter et de conduire dans les ports du royaume les navires des puissances neutres, quand même ils sortiroient des ports ennemis, ou qu'ils y seroient destinés ; à l'exception toutefois de ceux, qui porteroient des secours à des places bloquées, investies ou assiégées. A l'égard des navires des états neutres, qui seroient chargés de marchandises de contrebande destinées à * l'ennemi, ils pourront être arrêtés, et les [* 304] dites marchandises seront saisies et consisquées ; mais les bâtimens et le surplus de leur cargaison seront relâchés, à moins que les dites marchandises de contrebande ne composent les trois quarts de la valeur du chargement ; auquel cas les navires et la cargaison seront confisqués en entier ; se réservant au surplus Sa Maj. de révoquer la liberté portée au présent article, si les puissances ennemies n'accordent pas le réciproque dans le délai de six mois, à compter du jour de la publication du présent règlement.

II.

Les maîtres des bâtimens neutres seront tenus de justifier sur mer de leur propriété neutre par les passeports, connoissemens, factures, et autres pièces de bord ; l'une desquelles au moins constatera la propriété neutre, ou en contiendra une énonciation précise : et, quant

aux chartres-parties et autres pièces, qui ne seroient pas signées, veut S. M. qu'elles soient regardées comme nulles et de nul effet.

[* 305]

* III.

Tous vaisseaux pris, de quelque nation qu'ils soient, neutres ou alliés, desquels il sera constaté, qu'il y a eu des papiers jettés à la mer, ou autrement supprimés ou distraits, seront déclarés de bonne prise avec leurs cargaisons, sur la seule preuve des papiers jettés à la mer, et sans qu'il soit besoin d'examiner, quels étoient ces papiers, par qui ils ont été jettés, et s'il en est resté suffisamment à bord pour justifier, que le navire et son chargement appartiennent à des amis ou alliés.

IV.

Un passeport ou congé ne pourra servir que pour un seul voyage, et sera réputé nul, s'il est prouvé, que le bâtiment, pour lequel il auroit été expédié, n'étoit, au moment de l'expédition, dans aucun des ports du prince, qui l'a accordé.

V.

On n'aura aucun égard aux passeports des puissances neutres, lorsque ceux qui les auront obtenus se trouveront y avoir [* 306] contrevenu, ou lorsque les passeports * exprimeront un nom de bâtiment différent de l'énonciation, qui en sera faite dans les autres pièces de bord; à moins que les preuves du changement de nom avec l'identité du bâtiment ne fassent partie de ces mêmes pièces, et qu'elles aient été reçues par des officiers publics du lieu du départ, et enrégistrées par-devant le principal officier public du lieu.

VI.

On n'aura pareillement égard aux passeports accordés par les puissances neutres ou alliés tant aux propriétaires qu'aux maîtres des bâtimens, sujets des états ennemis de Sa Majesté, s'ils n'ont été naturalisés, ou s'ils n'ont transféré leur domicile dans les états des dites puissances, trois mois avant le 1 Septembre de la présente année; et ne pourront les dits propriétaires et maîtres de bâtimens, sujets des états ennemis, qui auront obtenu les dites lettres de naturalité, jouir de leur effet, si, depuis qu'elles ont été obtenues, ils sont retournés dans les états ennemis de Sa Majesté, pour y continuer leur commerce.

[* 307]

* VII.

Les bâtimens de fabrique ennemie, ou qui auront un propriétaire ennemi, ne pourront être réputés neutres ou alliés s'il n'est

trouvé à bord quelques pièces authentiques passées devant des officiers publics, qui puissent en assurer la date, et qui justifient que la vente ou cession en a été faite à quelqu'un des sujets des puissances alliées ou neutres avant le commencement des hostilités, et si le dit acte translatif de propriété de l'ennemi au sujet neutre ou allié n'a été dûment enrégistré par-devant le principal officier du lieu du départ, et signé du propriétaire ou du porteur de ses pouvoirs.

VIII.

A l'égard des bâtimens de fabrique ennemie, qui auront été pris par les vaisseaux de Sa Majesté, ceux de ses alliés ou des ses sujets, pendant la guerre, et qui auront ensuite été vendus aux sujets des états alliés ou neutres, ils ne pourront être réputés de bonne prise, s'il se trouve à bord des actes en bonne forme, passés par-devant les officiers publics à ce préposés, justificatifs tant de la prise que de la vente ou adjudication, * qui en auroit été faite [* 308] ensuite aux sujets des dits états alliés au neutres, soit en France, soit dans les ports des états alliés ; faute desquelles pièces justificatives, tant de la prise que de la vente, les dits bâtimens seront de bonne prise.

IX.

Seront de bonne prise tous bâtimens étrangers, sur lesquels il y aura un subrecargue marchand, commis ou officier-major d'un pays ennemi de Sa Majesté, ou dont l'équipage sera composé au-delà du tiers de matelôts sujets des états ennemis de Sa Majesté, ou qui n'auront pas à bord le rôle d'équipage, arrêté par les officiers publics des lieux neutres, d'où les bâtimens seront partis.

X.

N'entend S. M. comprendre dans les dispositions du précédent article les navires, dont les capitaines ou les maîtres justifieront, par actes trouvés à bord, qu'ils ont été obligés de prendre les officiers-majors ou matelôts dans les ports où ils auront relâché, pour remplacer ceux du pays * neutre, qui seront morts dans le [* 309] cours du voyage.

XI.

Veut S. M. que dans aucun cas les pièces qui pourroient être rapportées après la prise des bâtimens, puissent faire aucune foi, ni être d'aucune utilité, tant aux propriétaires des dits bâtimens qu'à ceux des marchandises, qui pourroient y avoir été chargées ; voulant S. M.

I H. & M.

qu'en toutes occasions l'on n'ait égard qu'aux seules pièces trouvées à bord.

XII.

Tous navires des puissances neutres, sortis des ports du royaume, qui n'auront à bord d'autres denrées et marchandises, que celles qui y auront été chargées, et qui se trouveront munis de congés de l'Amiral de France, ne pourront être arrêtés par les armateurs François, ni ramenés par eux dans les ports du royaume, sous quelque prétexte que ce puisse être.

XIII.

En cas de contravention, de la part des armateurs François, aux dispositions du présent règlement, il sera fait main-levée des [* 310] bâtimens et des marchandises, qui composent * leur chargement, autres toutefois que celles sujets à confiscation ; et les dits armateurs seront condamnés en tels dommages et intérêts qu'il appartiendra.

XIV.

Ordonne S. M. que les dispositions du present règlement auroient lieu pour les navires, qui auroient échoué sur les côtes dépendantes de ses possessions.

XV.

Veut au surplus S. M. que les dispositions du titre des prises de l'ordonnance de la marine du mois d'Août, 1681, soient exécutées selon leur forme et teneur, en tout ce à quoi il n'aura pas été dérogé par le présent règlement ; lequel sera lu, publié et enregistré dans tous les sièges des amirautés. Mande et ordonne S. M. à M. le Duc de Penthièvre, Amiral de France, de tenir la main à son entière observation.

Fait à Versailles, le 26 Juillet, 1778.

(Signé)
(Et plus bas)

LOUIS.
DE SARTINE.

[* 311] * *Règlement concernant les prises faites sur mer, et la navigation des vaisseaux neutres pendant la guerre, du 21 Octobre, 1744.*

DE PAR LE ROI.

Le Roi s'étant fait représenter le règlement du 23 Juillet, 1704, concernant les prises faites en mer et la navigation des vaisseaux

neutres et alliez pendant la guerre, Sa Majesté auroit reconnu que les dispositions de ce règlement étoient alors également sages et convenables, et que même il seroit à désirer pour le bien de son royaume, qu'elles pussent toutes être renouvelées pendant la présente guerre : mais comme il en est plusieurs qui ne sçauroient s'accorder avec les traités et conventions qu'elle a faits avec les différentes puissances depuis son avènement à la couronne, et que Sa Majesté s'est toujours fait une loi d'observer ses engagemens avec la fidélité la plus exacte, elle croit devoir faire céder ses intérêts à la foi qu'elle doit aux traités. D'un autre côté Sa Majesté ne pouvant pas douter que ses ennemis ne se *servent du pavillon et des passeports de [* 312] quelques états neutres, contre la volonté et les engagemens de ces mêmes états ; et Sa Majesté considérant que des conventions faites entre des souverains, uniquement pour l'avantage et la sûreté de leurs sujets respectifs, ne peuvent avoir jamais eu pour objet de faciliter des fraudes dont le préjudice ne peut être douteux, elle se croit d'autant plus fondée à empêcher ces fraudes, qu'il n'est pas moins contre l'honneur et la dignité, que contre les intérêts des états neutres, que des sujets téméraires compromettent leur droit en abusant de leur pavillon et de leurs passeports.

Dans ces circonstances, Sa Majesté a jugé à propos de rappeler dans le présent règlement les dispositions de celui de 1704, en distinguant celles qui ne doivent être exécutées qu'à l'égard des états avec lesquels il n'a point été fait de conventions, d'y en ajoûter de nouvelles conformes aux traités qu'elle a faits avec d'autres états, et d'y joindre même celles du règlement du 17 Février, 1694, afin que ceux de ses sujets que armeront pour la course, soient pleinement informés des règles qu'ils doivent *observer. Par ces [* 313] considérations, Sa Majesté a ordonné et ordonne ce qui suit.

ARTICLE PREMIER.

Fait Sa Majesté défenses aux armateurs François d'arrêter en mer et d'amener dans les ports de son royaume, les navires appartenans aux sujets des princes neutres, sortis d'un des ports de leur domination, et chargés pour le compte des sujets desdits princes neutres, de marchandises du crû ou fabrique de leur pays, pour les porter en droiture en quelque état que ce soit, même en ceux avec qui Sa Majesté est en guerre ; pourvû néanmoins qu'il n'y ait sur lesdits navires aucunes marchandises de contrebande.

II.

Leur fait pareillement défenses d'arrêter les navires appartenans

aux sujets des princes neutres, sortis de quelque autre état que ce soit; même de ceux avec lesquels Sa Majesté est en guerre, et chargés pour le compte desdits sujets des princes neutres, de marchandises qu'ils auront prises dans le pays ou état d'où ils seront partis, pour [* 314] * s'en retourner en droiture dans un des ports de la domination de leur souverain.

III.

Comme aussi leur fait défenses d'arrêter les navires appartenans aux sujets des princes neutres, partis des ports d'un état neutre ou allié de Sa Majesté, pour s'en aller dans un autre état pareillement neutre ou allié de Sa Majesté; pourvû qu'il ne soit pas chargé de marchandises du crû ou fabrique de ses ennemis, auquel cas les marchandises seront de bonne prise, et les navires relâchés.

IV.

Défend pareillement Sa Majesté auxdits armateurs d'arrêter les navires appartenans aux sujets desdits princes neutres, sortis des ports d'un état allié de Sa Majesté ou neutre; pour aller dans un port d'un état ennemi de Sa Majesté; pourvû qu'il n'y ait sur ledit navire aucunes marchandises de contrebande, ni du crû ou fabrique des ennemis de Sa Majesté; dans lequel cas lesdites marchandises seront de bonne prise, et les navires seront relâchés.

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* V.

Si dans les cas expliqués par les articles I., II., III., IV. de ce règlement, il se trouvoit sur lesdits navires neutres, de quelque nation qu'ils fussent, des marchandises ou effets appartenans aux ennemis de Sa Majesté, les marchandises ou effets seront de bonne prise, quand même elles ne seroient pas de fabrique du pays ennemi, et néanmoins les navires relâchés.

VI.

Veut Sa Majesté que tous vaisseaux pris, de quelque nation qu'ils soient, ennemie, neutre ou alliée, desquels il sera constaté qu'il y a eu des papiers jettés à la mer, soient déclarés de bonne prise, avec leur cargaison, sur la seule preuve constante des papiers jettés à la mer, et sans qu'il soit besoin d'examiner quels étoient ces papiers, par qui ils ont été jettés, ni s'il en est resté suffisamment à bord pour justifier que le navire et son chargement appartiennent à des amis ou alliés.

VII.

On n'aura aucun égard aux passeports des princes neutres, auxquels ceux qui les auront *obtenus se trouveront [*316] avoir contrevenu, et les vaisseaux qui navigueront sur lesdits passeports, seront déclarés de bonne prise.

VIII.

Un passeport ou congé ne pourra servir que pour un seul voyage, et sera considéré comme nul, s'il est prouvé que le navire pour lequel il auroit été expédié n'étoit, lors de l'expédition, dans aucun des ports du prince qui l'a accordé.

IX.

Tous connoissemens trouvés à bord non signés, seront nuls, et regardés comme actes informes.

X.

Tout navire qui sera de fabrique ennemie, ou qui auroit eu un propriétaire ennemi, ne pourra être censé neutre ni allié, s'il n'est trouvé à bord quelques pièces authentiques passées devant les officiers publics, qui puissent en assurer la date, qui justifient que la vente ou cession en a été faite à quelqu'un des sujets des puissances alliées ou neutres, avant la déclaration de guerre, et si ledit acte translatif de propriété de l'ennemi *au sujet neutre ou allié, n'a [*317] été dûment enregistré devant le principal officier du lieu du départ, et n'est soutenu d'un pouvoir authentique donné par le propriétaire, dans le cas où il n'auroit pas fait lui-même ladite dernière vente. A l'égard des navires de fabrique ennemie qui auront été pris par nos vaisseaux, ceux de nos alliés et de nos sujets pendant la présente guerre, et qui auroient ensuite été vendus aux sujets des états alliés ou neutres, ils ne pourront être réputés de bonne prise s'il se trouve à bord des actes en bonne forme, passés par des officiers publics à ce préposés, justificatifs, tant de la prise que de la vente ou adjudication qui en auroit été faite ensuite aux sujets desdits états alliés ou neutres, soit en France, soit dans les ports de nos alliés; faute desquelles pièces justificatives, tant de la prise que de la vente, lesdits navires seront de bonne prise, sans que dans aucun cas les pièces qui pourroient être rapportées par la suite, puissent faire aucune foi ni être d'aucune utilité, tant au propriétaire desdits navires, qu'à ceux des marchandises qui pourroient y avoir été chargées.

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XI.

On n'aura aucun égard aux passeports accordés par les princes neutres ou alliés, tant aux propriétaires qu'aux maîtres des navires sujets des états ennemis de Sa Majesté, s'ils n'ont été naturalisés, et n'ont transféré leur domicile dans les états desdits princes, avant la déclaration de la présente guerre : ne pourront pareillement lesdits propriétaires et maîtres des navires ou sujets des états ennemis, qui auront obtenu lesdites lettres de naturalité, jouir de leur effet, si depuis qu'elles ont été obtenues ils sont retournés dans les états ennemis de Sa Majesté, pour y continuer leur commerce.

XII.

Seront de bonne prise tous navires étrangers sur lesquels il y aura un subreçargue, marchand, commis ou officier-marinier d'un pays ennemi de Sa Majesté, ou dont l'équipage sera composé au-delà du tiers de matelots sujets des états ennemis de Sa Majesté, ou qui n'auront pas à bord le rôle de l'équipage, arrêté par les officiers publics des lieux neutres d'où les navires seront partis.

[* 319]

* XIII.

N'entendons comprendre dans la disposition du précédent article, les navires dont les capitaines ou les maîtres justifient par actes trouvés à bord qu'ils ont été obligés de prendre des officiers-mariniers ou matelots dans les ports où ils auront relâché, pour remplacer ceux du pays neutre, morts dans le cours de leur voyage.

XIV.

Les navires appartenans aux sujets du Roi de Dannemarck, et ceux appartenans aux sujets des Etats Généraux des Provinces Unies, pourront naviguer librement pendant la présente guerre, soit de leurs ports à des ports d'autres états neutres ou ennemis, ou d'un port neutre à un port ennemi, ou d'un port ennemi à un autre port ennemi, pourvu que ce ne soit pas à une place bloquée, et que dans ces deux derniers cas ils ne soient pas chargés en tout ou en partie, de marchandises réputées de contrebande par les traités, et ce nonobstant ce qui est porté par les quatre premiers articles du présent règlement, duquel néanmoins les articles VI., VII., VIII.,

[* 320] IX., X., XI., et XII., * seront exécutés à leur égard : et dans

le cas qu'ils se trouveroient chargés en tout ou partie desdites marchandises de contrebande, allant à un port ennemi, soit qu'ils fussent partis d'un autre port ennemi ou d'un port neutre, les-

I H. & M.

dites marchandises seront de bonne prise, sans que les navires et le surplus de leur cargaison, ni leurs biens et effets puissent être retenus, quand même ils appartiendroient aux ennemis.

XV.

Il en sera usé de même à l'égard des navires appartenans aux sujets du Roi de Suède, et de ceux appartenans aux habitans des villes Anséatiques, dans lesquels néanmoins toutes marchandises sans distinction, appartenantes aux ennemis, quand même elles ne seroient pas de contrebande, seront de bonne prise ; sans toutefois que les navires et le surplus de leur cargaison, ni leurs autres biens et effets puissent être retenus.

XVI.

Tous navires sortis des ports du royaume, qui n'auront à bord d'autres denrées et marchandises que celles qu'ils y auront chargées, * et qui se trouveront munis de congés de l'Amiral de [* 321] France, ne pourront être arrêtés par les armateurs François, ni ramenés par eux dans les ports du royaume, sous quelque prétexte que ce puisse être.

XVII.

En cas de contravention par les armateurs François aux défenses à eux faites par le présent règlement, veut Sa Majesté qu'il soit fait main-levée aux sujets des princes neutres, des navires à eux appartenans, et des marchandises du chargement, dans les cas où elles ne seroient pas sujettes à confiscation, et que lesdits armateurs soient condamnés en leurs dommages et intérêts.

XVIII.

Vent au surplus Sa Majesté que le titre des prises de l'ordonnance de la marine du mois d'Aôut 1681, soit exécuté suivant sa forme et teneur, en ce qui n'y est dérogé par le présent règlement. Mande et ordonne Sa Majesté à Mons. le Duc de Penthièvre, Amiral de France, de tenir la main à son exécution, et aux officiers de l'Amirauté de le faire publier, afficher et enregistrer * par-tout où [* 322] besoin sera à ce que nul n'en ignore. Fait au camp devant Fribourg, le vingt-un Octobre, mil sept cent et quarante-quatre.

(Signé)

LOUIS.

(Et plus bas)

PHELYPEAUX.

CASES

SELECTED FROM VOLUME II.

OF

KNAPP'S PRIVY COUNCIL REPORTS.

[THE CASES SELECTED ARE THOSE IN ADMIRALTY.]

1831-1834.

REPORTS OF CASES

ARGUED AND DETERMINED BEFORE THE

LORDS OF THE PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

* THE THETIS.¹

[* 390]

June 19 and 20, 1834.

In a case of salvage of treasure, by great exertions, from a wreck derelict and sunk under water, one third of the amount saved awarded to the salvors.

An admiral, who had taken upon himself personal exertion and responsibility, in recovering such treasure, by means of the ships under his command, held entitled to an eighth of the sum awarded for salvage.

The admiralty held entitled to repayment for the pay, victualling, and wear and tear of the king's ships, for the time that they were employed upon a service of salvage of private treasure lost on board of a king's ship, and that repayment deducted from the amount of the money decreed for salvage.

On the 5th of December, 1830, his Majesty's frigate *Thetis*, on her voyage from Rio de Janeiro to England, with a freight of bullion of the value of \$819,942, was wrecked on the south-western end of the island of Cape Frio, on the Brazilian coast. Twenty-five of the crew were drowned, and the remainder were with difficulty saved from the wreck, and remained on the adjoining shore in a state of great distress, until the arrival of Rear-Admiral Sir Thomas Baker, the commanding officer on the station, who, immediately upon hearing of the wreck, on the 10th of December, at Rio, sailed from thence to their assistance, with *The Clio* and *The Algerine*, sloops of war, *Adelaide*, schooner, and the launch of his own flag-ship, *The Warspite*. He was obliged, however, by adverse winds, to put back to

¹ Present, the Vice-Chancellor, Mr. Justice Bosanquet, Judge of the Prerogative Court, (Sir J. Nicholl,) and the Chief Judge of the Court of Bankruptcy.

The Thetis. 2 Knapp.

Rio, after three days' ineffectual endeavor to make Cape Frio; and he then proceeded thither the next day by land, leaving orders for the vessels to follow him at the first opportunity, which they [*391] shortly did, together * with The Druid, frigate, which joined them on their passage.

Admiral Baker found that the wreck of The Thetis had drifted into a small cove, of a rectangular form, bounded on three sides by nearly perpendicular cliffs, from 108 to 194 feet in height, and open in front to the whole force of the Atlantic Ocean and the winds from the south-west, whence the strongest gales usually blow in that part of the world. The depth of water in this cove varied from three and a half to twenty-four fathoms; the surf in it was generally tremendous, forming a species of whirlpool in the midst of it, and the bottom shelved rapidly to seaward, and was full of large rocks. Only the taffrail of The Thetis was occasionally visible, and it was found that she had heeled over on her side, with her deck to the seaward.

Admiral Baker left The Algerine to guard the wreck, and despatched the other vessels, with the survivors of the crew of The Thetis, to Rio, where he himself returned overland on the 24th of December. He immediately began to concert measures for the preservation of the property lost in the wreck; and his first proceeding was to cause a large net, 480 feet long and twelve feet high, to be constructed of chain cables and hawsers, for the purpose of being sent to the cove, and there to be stretched over its mouth from lanyards fastened to floating buoys, in order to prevent any articles being washed from the wreck out to sea. He then consulted with Captain Dickenson, of his Majesty's sloop of war Lightning, an officer who had received a gold medal from the Royal Society for his skill in mechanics, as to the best means to be adopted for removing the sunken property and treasure; and, under Captain Dickenson's [*392] directions, a diving-bell was * constructed by an English engineer of the name of Moore, in the employment of the Brazilian government, out of two iron water-tanks belonging to The Warspite, and an air-pump was made by a French artisan, of the name of De Fleury. When these preparations had been completed, Captain Dickenson was despatched to Cape Frio, with The Lightning, under orders to relieve The Algerine, and "after receiving from Captain Martin, the commander of that vessel, every information which he might have to communicate, relating to the position and state of the wreck, to lose no time in commencing operations with the diving-bell, and other apparatus with which he was furnished, for the recovery of the public property and treasure sunk in The Thetis." For these purposes, Captain Dickenson had placed under his com-

mand The Adelaide, tender, the launch belonging to The Warspite, and another launch; which was procured by the admiral from the Brazilian government. The Adelaide and Warspite launch were manned by detachments from the crew of The Warspite, the Brazilian launch was manned principally from The Lightning. He was also accompanied by the engineer, Moore, the carpenter and carpenter's crew of The Warspite, and two seamen accustomed to the use of the diving-bell, who were taken by the admiral from The Clio; and he was supplied with hose for the bell and pumps, and tackle of every description, from The Warspite.

Upon Captain Dickenson's arrival at Cape Frio, on the 30th January, 1831, he found the wreck had completely sunk under water, and was lying at a depth varying from six and a half to eleven fathoms. Upon actual inspection of the localities of the place, which he had never previously seen, he was induced to alter the plan * which had been originally settled between Admi- [* 393] ral Baker and himself, as to the mode of suspending the diving-bell. The admiral had proposed to hang it from suspension cables, extended from cliff to cliff across the cove, and to this scheme Captain Dickenson had assented whilst at Rio; he now, however, determined to suspend it from a high derrick, or crane, fastened upon the cliff. Immediately after the net had been placed, according to the admiral's directions, over the mouth of the cove, the derrick was commenced to be made, out of the loose spars of The Thetis that had been picked up; and, in the mean time, a small diving-bell was constructed from a one-ton water-tank, which was worked from the launches, and by this much treasure was recovered from the wreck before the derrick was completed.

On the 11th of April, 1831, the derrick, with the assistance of a reinforcement of seventy-four men from The Warspite, was placed on a step cut in the cliff, about twelve feet from the level of the sea. Its height was 158 feet, and its head was placed directly over the spirit-room of The Thetis, where the treasure had been kept. The reinforcement of seventy-four men returned to The Warspite, by The Adelaide, on the 21st of April; but they were succeeded by another party of fifty men, sent by Admiral Baker from the same vessel, and which arrived at the cove on the 30th of April, and they remained there until the 16th of May, when all the men belonging to The Warspite finally returned to Rio, by The Adelaide. The rigging of the derrick was completed on the 6th of May, and on that day the great diving-bell was suspended from it, and worked with great success, notwithstanding very rough weather, until the 18th of May, during which time about \$50,000 were recovered by it. On the

[* 394] * 18th, a violent gale of wind from the west-south-west broke the derrick in two, at a height of about twenty feet from the water, and did considerable injury to its rigging. The great bell was left at the bottom of the cove, and so much damaged by the storm as to be afterwards useless.

Upon the destruction of the derrick, Captain Dickenson returned to the original plan of working the bell from suspension cables. They were accordingly put in hand on the 20th of May, and by the 4th of June were suspended across the cove, but from different points from those which had been proposed at Rio. They were not completed, however, for use, until the 19th of October, when a new great bell, made out of a water-tank, was worked from them for the first time. This bell was used, at first, in searching for treasure; but, after the 1st of November, it was principally employed in removing the guns and government property from the wreck. During the whole time, from the destruction of the derrick until the removal of Captain Dickenson, the small bell was worked from the launch when the weather would permit, and a great quantity of treasure was preserved by it.

A great proportion of the property on board The Thetis had been insured at Lloyd's, and a committee of underwriters was appointed, on the receipt of the intelligence of her loss, to concert measures for its preservation. An application was made to the admiralty, who sent orders to Admiral Baker to use every means for its protection. The chairman of the committee, also, wrote to the admiral on the 6th of April, 1831, inclosing him an unanimous vote of thanks for the exertions he had already made, and requesting him to instruct his secretary, or the officer left in command at Cape Frio,

[* 395] to communicate to the * writer, from time to time, the result of the proceedings; and also whether it might be advisable to send from this country (England) bells, machinery, and engineers, to assist in the undertaking. And, should any circumstances induce him to give up any further attempt for the recovery of the treasure, as hopeless, earnestly to request him to let his reasons for so doing be fully communicated to the writer; and also that he would, as far as he possibly could, have a watch kept near the spot where the wreck had sunk. "If, on the contrary," the letter proceeded, "and as I sincerely hope will be the case, you may be successful in saving the whole or any part of this property, I have to beg that you will order this property to be immediately forwarded by one of his Majesty's ships or packets, without being landed at Rio, and addressed to the chief clerk of the bullion-office, Bank of England; and directing, if you please, advice to be sent to me, as circumstances may

render it advisable, to have the necessary insurance effected to cover the property, and also the charges to which it may be liable." In consequence of this letter, a correspondence was kept up between the admiral and the chairman of the committee at Lloyd's. He subsequently appointed Messrs. Samuel & Phillips his agents at Rio, and directed Captain Dickenson to have recourse to them for any assistance he might need. Having made these arrangements, Admiral Baker sailed, in the beginning of July, 1831, for the Cape of Good Hope, where, as well as upon the South American station, the naval forces were under his command.

During Admiral Baker's absence Captain Dickenson was seized with a violent fit of illness, and, whilst he was laboring under it, he despatched letters to Lord James Townsend, the commanding officer at Rio, in *the absence of Admiral Baker, in [*396] which he expressed his despondency in being able to recover any great amount of treasure more, and desired to be recalled. In consequence of these letters, an officer was sent by Lord James Townsend to take the command of *The Lightning*; but before he arrived Captain Dickenson had recovered, and resumed the command of his ship and the superintendence of the operations on the wreck. Admiral Baker returned to Rio in December, 1831, and, in the beginning of the next year, he paid a visit to the cove, where he arrived on the 5th and staid till the 14th of February, 1832. He exerted himself there in encouraging the men in their undertaking; and upwards of \$50,000 were recovered during the time he was there, and in the intervening time before the recal of Captain Dickenson.

Captain Dickenson received orders of recal from the Admiralty in the following month, and he accordingly delivered up the diving-bells and tackle to Captain De Roos, of *The Algerine*, which was sent by Admiral Baker to take the place of *The Lightning*; and sailed from Cape Frio on the 9th of March, 1832, after a stay there of nearly fourteen months. During this time he had recovered from the wreck and transmitted by various vessels to England \$588,705. His crew and himself had endured great hardships, from exposure to a scorching and unhealthy climate, from constant tempests, and from insects called chigres, which greatly annoyed the working parties; and the men employed in the bell were frequently in great danger from accidents happening in the air-pipes, and suffered much from the stench arising from the putrid provisions of *The Thetis*, through which it was necessary to cut before the treasure could be got at. The first lieutenant of *The *Lightning* died from the effects [*397] of the fatigues he had undergone, on his arrival at Rio; and the crew were stated to have been deteriorated very much in their

general health. Mr. Moore and three seamen were drowned during the time, from the oversetting of a boat; this, however, was the effect of an accident, and not attributable to the service in which they were engaged.

Whilst both parties were in Brazil, a dispute arose between the admiral and Captain Dickenson, about the amount of salvage the former should receive. Captain Dickenson had told the admiral's secretary that he should not object to the admiral's receiving an eighth of it. The admiral, upon hearing this, intimated to Captain Dickenson that he would accept nothing from him, but would receive what the law might direct; upon which Captain Dickenson retracted his offer.

Captain De Roos adopted a system of operations differing, in some respects from that followed by Captain Dickenson. He first took an accurate plan of the space into which the spirit-room had discharged its contents, and found it formed an ellipse, of which the major axis was forty-three and the minor thirty-one feet, beyond the limits of which no treasure had been discovered. This space was filled with large boulder rocks of granite, the intervals between which were filled with guns, and fragments of the wreck and treasure, forming together compact masses, which it was difficult to remove. He next surveyed the cliffs, to find eligible spots to fix his purchases to, and wherever a point was selected an eye-bolt was placed and leaded; and thus the crew had, in every direction, points to which they could direct the force of their capstan. He then proceeded to remove, by means of the capstan, the whole of the rocks [*398] * and rubbish from the space previously described, working the diving-bell solely from the suspension cables, the point of suspension of which he altered twenty-five feet. By these means his divers were able to descend even in rough weather, which never was the case when it was worked from the launches. By the 21st of July, 1832, he had removed every rock within this space, the last of them weighing about sixty-three tons, and recovered \$161,500, notwithstanding a succession of stormy weather for seventeen days, in the early part of his operations, before he had fully adopted the system of working from the suspension cables. On the 27th of July The Algerine quitted the cove.

The whole amount of treasure thus recovered was \$750,301, which were immediately attached, as derelict, on their arrival in England. The value of these dollars, when sold, was stated in English money to be about 157,349*l.* 17*s.* The value of the ordnance stores recovered, and which were of course restored to government, was 1,206*l.* 10*s.* 8*d.*

Separate claims were put in before the Court of Admiralty on this treasure, on behalf of Captain Dickenson and the officers and crew of *The Lightning*, and others, the actual salvors of the treasure recovered under Captain Dickenson's command; of Captain Talbot, the commander, and the other officers and crew of *The Warspite*; of Admiral Baker, of the admiralty, for the sum of 13,833*l.* 8*s.* 7*d.*, being the amount of the wages and victuals of the crews, and stores, and wear and tear of *The Lightning*, *Adelaide*, and *Algerine*, whilst they were employed in the salvage; of Captain De Roos, and the officers and crew of *The Algerine*; of Mrs. Moore, the widow of Moore, the engineer; and of the owners and underwriters.

* On the 20th of March, 1833, the judge of the Court of [* 399] Admiralty, Sir C. Robinson, made his decree in this case, by which he pronounced the sum of 17,000*l.* to be due for salvage to Captain Dickenson, the commander, and the officers and crew of *The Lightning*, and the officers and crew of *The Adelaide*, and others acting under the orders of Captains Dickenson or De Roos; to Captain De Roos, the commander, and the officers and crew of *The Algerine*, and to the admiral, Sir Thomas Baker, K. C. B., late commander-in-chief of his Majesty's ships and vessels on the South American station, together with all such costs and expenses as have been lawfully and justly incurred on their behalf, and the expenses incurred by the Lords Commissioners of the Admiralty for wages, victuals, stores, and wear and tear of his Majesty's sloops *Lightning* and *Algerine*, and schooner *Adelaide*, as set forth in the account brought in by the Proctor of the Admiralty; and he condemned the treasure in such sum and expenses, and referred all accounts to the registrar and merchants. The judge, moreover, decreed the 17,000*l.* to be thus apportioned: 500*l.*, in certain specified shares, among twenty-two petty officers and seamen of *The Lightning*, by name; 300*l.* to the officers and men serving on board *The Adelaide* subsequently to the 31st May, 1831; 200*l.* to Mrs. Moore; to Admiral Baker such share of the remainder of such salvage as he would be entitled to, as a flag-officer, on such a sum, to be distributed under his Majesty's order in council of the 30th of June, 1827; and the remaining sum to and amongst the commanders, officers, and men sent on board *The Lightning* and *Algerine*, or under the orders of the respective commanders thereon, on the said salvage service, ratably, * according to the value of the treasure saved [* 400] by the said sloops respectively, and also ratably to the said officers and men, according to the periods of their services on board the said sloops, or under the orders of the commanders thereof. And

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he rejected the claim on behalf of Captain Talbot and the officers and crew of *The Warspite*.

From this decree Captain Dickenson appealed, as to the amount of the salvage awarded, as to the allotment of a flag-eighth to Admiral Baker, and as to the allowance of the expenses for wages, &c., to the admiralty. Admiral Baker appealed as to the amount of salvage only. The amount of the expenses incurred by Admiral Baker's agents at Rio were found to amount to about 7,000*l*.

Dr. Adams and Alexander, for Captain Dickenson and the crew of *The Lightning*. The owners in this case at first objected to allow any salvage, on the ground that king's ships were bound to assist in preserving the property of merchants of our country, without reward or recompense. This objection was, however, expressly overruled by Lord Stowell, in *The Mary Ann*; ¹ and it is now a well established principle, that the officers and men of his Majesty's navy are equally entitled with any other class of salvors to a remuneration for their labor and services, in saving from destruction the ships or the cargoes of their fellow-countrymen. There is no ground for contending, in this case, that the owners of the recovered property were entitled to the gratuitous services of the navy, because it was lost [*401] on board a *king's ship. Government does not insure the property placed on board the vessels of his Majesty. The merchant who consigns his treasure by them is not warranted against all loss, though he may justly count upon more than ordinary security from either the attacks of an enemy or the dangers of a tempest.

The principal question, therefore, as regards the owners and underwriters, will be the amount of salvage which they ought to pay for the restitution of their property. Upon this, as Lord Tenterden tells us, ² all foreign codes of maritime law, both ancient and modern, contain provisions and enactments; but the law of England, like the law of some other countries, has fixed no positive rule or rate of salvage. Although, however, Lord Tenterden states correctly the modern practice with regard to salvage, yet there is no doubt but that, in ancient times, the practice in the English Court of Admiralty was, to award to the salvor, in all cases of derelict, one half of the value of the property preserved by his exertions. This is clearly proved by the ancient authorities referred to in *The Aquila*,³ although

¹ 1 Hagg. Adm. R. 158.

² Abbott on Shipping, part 3, cap. 10.

³ 1 Rob. 37.

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Lord Stowell, in that case, did not consider himself bound by that practice; and awarded no more than two fifths of a cargo, worth 12,000*l.*, to salvors, who only towed a deserted vessel, in sight of land into port, and whose principal merit consisted in having obeyed a magistrate, and not having suffered it to be plundered by a mob. In the same spirit, Lord Stowell, in *The Fortuna*¹ and *Maria*,² only awarded two fifths of the value of derelict vessels to salvors, who, without any danger, had brought them into Harwich;

* with an additional gratuity, in the latter case, of fifty [*402] guineas to the crew of a king's ship which had assisted them. In *The Blenden-Hall*,³ too, he only awarded the tenth of the value of a derelict vessel, worth 72,000*l.*, to an officer and ten men of a post-office packet, for four days' unassisted service in her preservation. This was, however, by no means the spirit in which he acted in cases of extraordinary merit; as in *The L'Esperance*,⁴ in which he awarded a moiety of the property saved; and in *The Jonge Bastiaan*,⁵ where the ship had, like *The Thetis*, actually sunk, he awarded two thirds of the value to the salvors. In *The Jubilee*,⁶ likewise, where, by very great exertions, a vessel and cargo were recovered from the bottom of the ocean, a similar amount of salvage was decreed. Although, therefore, the Court of Admiralty will not acknowledge itself strictly compelled to follow the old rule of awarding one half in every case of derelict, yet where there has been extraordinary merit displayed, or danger incurred, it will generally abide by, and sometimes even go beyond it. If ever any case, however, demanded a large remuneration, it is the present; which, for the duration and the hardship of the services, the number of the salvors, the value of the property restored to its owners, and the ingenuity, perseverance, and hardihood, both of the commanders and sailors employed, stands unequalled in the annals of the Court of Admiralty.

The claim by the admiralty for the wear and tear of the vessels, and the wages of the officers and men employed in this service, is both unprecedented and unjust. The *Lightning*, during the whole period she * was employed, laid in the harbor of [*403] Cape Frio, ready, in every respect, for his Majesty's service, and suffered not so much wear and tear as if she had been employed in any other way for the protection of British commerce in that part

¹ 4 Rob. 194.

³ 1 Dodson, 414.

⁵ 5 Rob. 322.

² Edwards, 175.

⁴ Ibid. 46.

⁶ Admiralty, 7th July, 1826. Not reported.

of the world. The Adelaide actually, during part of the time, acted as a tender to the fleet upon the station. Had these vessels been employed in the carrying of bullion, no deduction would have been claimed by the admiralty from the captain's freight; yet the salvage of bullion that was lost was surely a more difficult and disagreeable duty than the mere conveying it to England, and ought, therefore, to be more favored.

With regard to the services of Admiral Baker, a much greater proportion of salvage has been awarded them by the court below than they deserved. He had no claim whatever, under any order of council, for a share, in his right as admiral, and the only pretension he can therefore advance is for his actual services; and the question, consequently, is, as to what they consisted of. He invented no machines for the preservation of the treasure, except the net, which was perfectly useless, at any rate for the purpose of hindering the dollars from being washed out to sea. His plan of suspension cables was never acted upon, for they were hung from different points from what he had directed; his responsibility (if any) for stores was speedily removed, by the letters from the committee at Lloyd's; and, in fact, Captain Dickenson always considered the enterprise and the liabilities as his own. All that the admiral did towards the saving of the treasure, with the exception of the two visits to the cove, with thirteen months' interval between them, the one being before any thing was done, and the other after the principal part of the [* 404] dollars had * been recovered, was to give orders. The mere giving of orders, however, without any personal exertion, has been decided by Lord Stowell, both in *The Aquila*¹ and *The Vine*,² not to entitle a person to any share in the salvage.

Sir E. Sugden, K. C., and *Dr. Lushington*, for Admiral Sir T. Baker, urged the same reasons, and relied upon the same cases, as the counsel for Captain Dickenson, in support of the proposition that the amount of salvage should be increased. The reward adjudged by the court below was not only incommensurate with the services rendered, but infinitely less than had ever been apportioned to the salvors, in any case approaching the present, in difficulty or duration of service. Lord Stowell always looked to the general mercantile interests of Great Britain, and acted upon the principle, that if officers were not compensated for their services, commerce would, in a great measure, be deprived of their protection.

¹ 1 Rob. 46.² 2 Hagg. Adm. R. 1.

There is no doubt but that salvage ought not to be allowed for constructive services, and that there must be personal responsibility and personal exertions to entitle any claimant to share in it. Here, however, the question is not, as in *The Aquila* and *Vine*, of the right of the claimants to share at all, but the right of the admiral to share being admitted, the doubt is only as to the amount of it. The court below did not, as has been urged on the other side, award to the admiral a share as commander, deducted from the shares of the other salvors; but having adjudged 17,000*l.*, as the total * sum to be paid for salvage, it then proceeded to distribute [*405] it amongst the salvors, in proportion to their merit; and there are three grounds on which the allotment of one eighth to the admiral may well be supported: First, it was the correct proportion, by reference to the admiral's services; secondly, it was so by analogy to the share allowed by government to admirals, in the captures of smugglers, pirates, and slave ships; thirdly, because it was the very proportion which Captain Dickenson had originally proposed to give the admiral. On the latter of these grounds there can be no doubt, as it was matter of evidence. On the second it would be difficult to find a more correct analogy for the court to proceed upon, in a case which was totally without a precedent, for it was seldom or never that admirals were present at the actual captures of pirates or smugglers, which were generally taken by the small detached vessels of their squadrons. On the first, Admiral Baker, without the aid of analogy or of former admission by his present opponents, was clearly entitled to the proportion which had been allotted to him by the court below. From the moment he heard of the loss of *The Thetis*, he hastened to the cove where she laid; he left *The Algerine* to protect her; on his own sole responsibility he supplied Captain Dickenson with the whole of the materials for the diving-bells and the derrick, partly from the stores of the king's ships, for which he was answerable to the admiralty, and partly from his own agents at Rio; he directed the formation of the net, which was found by Captain De Roos to have been most useful; he originally planned the suspension cables, which were subsequently adopted both by Captain Dickenson and by Captain De Roos, and from which, if the bell had been worked from the commencement * of [*406] the enterprise, as it subsequently was by Captain De Roos, there is little doubt but that the treasure would have been recovered in a much shorter time. He visited the cove, and encouraged the men to further exertions when their hopes of recovering any more treasure had begun to fail; he obtained the sanction of the Brazilian government for the prosecution of the salvage: and, finally, during

The Thetis. 2 Knapp.

the whole time the ships and crews were employed in the cove, they were under his command, depending upon him for supplies, and their commanders in constant communication and correspondence with him.

Dr. Dodson and *Shepherd* appeared for the admiralty, and cited *The Waterloo*,¹ but did not proceed with their arguments, as they were informed that the court was with them.

The *King's Advocate*, (Sir H. Jenner,) and *Follett*, and *Dr. Nicholl*, were with them, for the owners and underwriters, in support of the judgment of the Court of Admiralty. Although it cannot be disputed that the officers and men of king's ships are entitled to salvage, since the case of *The Mary Ann*,² yet still they ought not to have so large an amount awarded them as ordinary salvors. In the one case, the time, the trouble, the demurrage, are to be paid for; in the other, the wages are equally paid, and the ships employed by the crown, whether they are engaged upon the salvage or upon any other service, for the protection of the commerce of the country. On many of these services — convoys, for instance — the navy receive no recompense from the merchants; and even in [*407] cases of salvage from the enemy, *which furnish, perhaps, the best analogy to civil salvage, their remuneration is fixed by act of parliament³ at an eighth of the value of the recaptured property, whilst a sixth is awarded to a private ship for the same service. This distinction, although not expressly, was, in fact, taken in the judgment in *The Mary Ann*; for there, although the services were very great, yet only a tenth of the value of the property saved was awarded to the king's ship which preserved it.

VICE-CHANCELLOR. That was not a case of derelict.

The merit of the salvors in that case was as great as in any case of derelict. It is very doubtful, however, whether the present is a case of derelict; for although the crew left the vessel, yet they remained on the adjoining coast to guard her, and, from the moment that Admiral Baker arrived, a vessel was especially placed for that purpose. Admiral Baker ought, in truth, to be regarded from the first as the agent of the owners. The captain, placed by his orders in *The Thetis*, had agreed to convey the treasure; the admiral was

¹ 2 Dodson, 433.

² 1 Hagg. Adm. R. 158.

³ 33 Geo. III. c. 66, s. 42.

The Thetis. 2 Knapp.

to receive a proportion of the freight; and he was bound, therefore, to do every act in his power for the preservation of the cargo. The expenses of the vessels he employed in that service are amongst those charged by the admiralty.

The old rule, if it ever existed, of giving one half of the value of a derelict vessel to the salvors, has never been insisted upon since the decision in *The Aquila*.¹ The modern practice has been, even in cases of clear derelict, to award less than a third, except where very great exertion has been used, as in the *L'Esperance*² and

* *Jonge Bastiaan*.³ In *The Blenden-Hall*,⁴ only a tenth [*408] was given, although it was a case of very great merit. In this case, when the expenses of the admiral's agent at Rio, the admiralty expenses, and the legal expenses (increased greatly by the disputes between the admiral and Captain Dickenson) are added to the 17,000*l.* awarded for salvage, they will amount to about 43,000*l.*, which comes to very nearly a third of the 157,000*l.* saved. In all the cases, indeed, the amount of the salvage has been reckoned, not independently of, but inclusive of, a compensation to the owners, for the risk of their property, and the damage and demurrage for their vessels. *San Bernardo*;⁵ *Jane*.⁶ The salvage awarded ought, therefore, to be considered sufficient, especially when the magnitude of the sum is considered; for, when the property saved has been very large, it has always been the practice of the Court of Admiralty to award only a moderate proportion of it to the salvors, because that would afford them a sufficient remuneration for their services. *Waterloo*;⁷ *Mary Ann*. When it is considered, therefore, that the salvors in this case were employed upon the public service, in the recovery of the wreck and stores of one of his Majesty's ships; that a great part of the time and many of the stores, for which the respondents in this case must pay, were expended in the erection of a derrick, which was speedily destroyed; and that, had the simple methods pursued by Captain De Roos been adopted from the commencement of the enterprise, it would have been brought to a conclusion at a very much earlier period * than it was [*409] under the system which Captain Dickenson so long persisted in following, it is to be hoped that the judgment of the court below will be affirmed.

¹ 1 Rob. 37.

⁴ 1 Dodson, 414.

⁷ 2 Dodson, 442.

² 1 Dodson, 46.

⁵ 1 Rob. 177.

³ 5 Rob. 322.

⁶ 2 Hagg. Adm. R. 338.

The Thetis. 2 Knapp.

THE VICE-CHANCELLOR. In this case it is enough for me to state, without going through the whole of the facts which have been brought before us, that their lordships are unanimously of opinion that a sufficient sum has not been awarded to Admiral Baker, Captain Dickenson, and the crew of The Lightning, who are the only persons complaining of the decree of the court below.

Their lordships are of opinion, having regard to the arduous nature of the service and the responsibility, which it is quite clear that, in the first instance, Admiral Baker took upon himself, and the labors and privations which Captain Dickenson and his crew were necessarily subject to, during the length of time they were employed in the service, their long exposure to an unwholesome climate, and to the various inconveniences which are enumerated in these papers, that it will not be too much to award to Admiral Baker and Captain Dickenson and his crew, a sum of 12,000*l.*, in addition to the sum which, by the decree of the court below, they are already entitled to receive. The intention of their lordships, therefore, is, to order that the decree should, in point of form, be reversed; but that the substance should stand, so far as it goes, with this variation, that the expenses of the appeal should be paid out of the gross fund; and that, in addition to the sum of 17,000*l.* to be divided in the way the court has directed, a further sum of 12,000*l.* should be divided between Admiral Baker and Captain Dickenson and the [* 410] crew of The Lightning, according to * the proportions mentioned in the order in council of 1827.¹ The effect of this alteration will be to give Admiral Baker one eighth of that sum, to Captain Dickenson two eighths, and the remaining five eighths will be divided in the manner which is specified at length in that order.

Their lordships are, indeed, of opinion, that not only does the length of service, and the other circumstances to which I have alluded, in general justify the giving of this increased sum, but that the giving of it will be in perfect accordance with the spirit of the decisions already made, which have certainly departed from the old rule of giving a moiety, and have rather tended to give a third of the value of the property saved, or thereabouts. In this case it appears, from the representations in the papers, that the actual amount of treasure which has been raised for the underwriters from the bottom

¹ This order has been repealed by the order in council of the 19th of March, 1834, and the proclamation of the same date, which see in Appendix.

The Thetis. 2 Knapp.

of the ocean is 157,000*l.* and upwards; the admiralty expenses amount to 13,800*l.*; the estimated expenses of agents, and the legal expenses, including both what have already been decreed, and which we intend to decree upon this appeal, will amount to about 12,000*l.* more. Those sums, added to the sum already awarded for salvage, will amount to 42,800*l.*, or thereabouts; and if, in addition to that, we give a further sum of 12,000*l.*, the whole sum which then must be deducted from the gross quantity of treasure, will be 54,000*l.* and a fraction, which is something more than a third of the whole 157,000*l.* recovered. These are the only alterations which their lordships propose to make in the decree in this case.

CASES

SELECTED FROM VOLUME VIII.

OF

KNAPP'S PRIVY COUNCIL REPORTS.

[THE CASES SELECTED ARE THOSE IN ADMIRALTY.]

1834-1836.

REPORTS OF CASES

ARGUED AND DETERMINED BEFORE THE

LORDS OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

*THE NEPTUNE.

[*94]

William Hodges, *Appellant*; Jacob Sims and William Unwin Sims,
Respondents.¹

February 12, 14, and July 1, 1835.

Material men have no lien for supplies furnished in England on the proceeds remaining in the registry of the Court of Admiralty of a ship sold under a decree of that court for the payment of the seamen's wages.

A mortgagee in possession of a ship so sold, entitled to the remainder of such proceeds after payment of seamen's wages and costs.

On its return to the port of London from a voyage to Calcutta, the ship Neptune was attached, and sold under a decree of the Court of Admiralty, in a suit instituted for the payment of the sailors' wages. After payment of the wages, the remainder of the proceeds, amounting to upwards of 4,000*l.*, were deposited in the registry, and two petitions were presented with respect to them; one by Messrs. Sims & Co., claiming as material men the sum of 361*l.* 11*s.* 3*d.* for ropes and line supplied to the ship for her last and last preceding voyages; and the other by Mr. Hodges, a mortgagee, who had taken possession of the ship by putting a shipkeeper on board before she was seized under the process of the court, and who claimed the whole of the proceeds in satisfaction of two mortgages for 6,000*l.* and

¹ Present: The Vice-Chancellor, Mr. J. Bosanquet, the chief judge of the Court of Bankruptcy, the chief judge of the Prerogative Court.

The Neptune. 3 Knapp.

2,000*l.* and interest, made to him by the owner of the ship subsequently to her leaving London on her last voyage. These mortgages contained the usual power of sale to the mortgagee, and [* 95] covenant * by the mortgagor for the mortgagee's quiet possession in default of payment of the mortgage money; and they had both been duly noted as transfers by way of mortgage on the ship's register, in pursuance of the 6 Geo. 4, c. 110.

On the 7th Feb. 1834, the judge of the Court of Admiralty pronounced the sum of 361*l.* 11*s.* 3*d.* to be due to the Messrs. Sims for the materials and supplies furnished by them for the use and benefit of the said ship, together with the costs of suit, and condemned the proceeds of the said ship, her tackle, apparel, and furniture remaining in the registry, in such sum and costs. [3 Hagg. Ad. R. 139.]

An appeal was instituted from this decree to the king in council.

Holt, (K. A.,) and *Phillimore*, (Dr.,) for the appellant.

This case presents three points for the consideration of the court: first, whether any lien at all upon a ship exists by the law of England; secondly, if no such lien exists upon a ship itself, whether it can be deemed to exist upon the proceeds of a ship sold under the decree of the Court of Admiralty, and distributable under that court's authority; and thirdly, whether the Court of Admiralty is not obliged to notice the rights of a mortgagee of a ship under the registry act, when properly brought before it.

On the first point, it is true that doubts formerly existed whether the Court of Admiralty had not the power of enforcing a lien on a ship by the persons who had furnished her outfit, technically called material men. Notwithstanding the statute 15 Rich. 2, cap. 3,

which especially provides that the Admiralty Court shall

[* 96] * have no jurisdiction over contracts arising within the body of any county, as well by land as by water, (such as contracts with material men in Great Britain necessarily must be,) yet in the reign of Charles II., we find the power of that court to enforce a lien upon such contracts maintained and asserted in a memorial to the king by Sir Leoline Jenkins.¹ Two attempts which were made in the Court of Admiralty to enforce such a lien, one in the case of *Hoare v. Clement*,² about the same time, and the other in *Justin v. Ballam*,³ in the reign of Queen Anne, were stop-

¹ Life of Sir L. Jenkins, 2d vol. p. 746.

² 2 Show, 338.

³ Salk. 34, and 2 Ld. Raym. 805.

ped by prohibition. In later times language was held by Lord Mansfield, in *Rich v. Coe*,¹ which seemed to authorize such a lien; but that case has long been held completely overruled by the judgment of the same judge, in *Wilkins v. Carmichael*,² and is directly opposed to the decisions of Sir Joseph Jekyll, in *Watkinson v. Barnardiston*,³ of Lord Hardwicke, in *Buxton v. Snee*,⁴ and *Ex parte Shank*,⁵ and of Lord Kenyon, in *Westerdell v. Dale*.⁶ The law, indeed, is laid down as settled by Lord Tenterden, in his *Treatise on Shipping*,⁷ in these terms: "A shipwright who has once parted with the possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions or other necessities for a ship, are not by the law of England preferred to other creditors, nor have any particular claim or lien upon the ship itself for the *recovery of their demands." [* 97] The lien of a master for advances on account of his ship, either on the ship itself or its freight, is held equally inadmissible. *Wilkins v. Carmichael*,⁸ *Hussey v. Christie*,⁹ and *Smith v. Plummer*.¹⁰

Secondly, If material men have no lien on the ship, they can have none on the proceeds of her sale. This very point has been several times determined. In *Watkinson v. Barnardiston*,¹¹ which resembles the present case in every point, except that the ship was sold under the decree of the court of chancery, (as appears by Mr. Cox's note to it,) it was decided by Sir Joseph Jekyll, that "if a ship be in the river Thames, and money be laid out there, either in the repairing, fitting out, new rigging and apparel of the ship, this is no charge upon the ship, but the person thus employed, or who finds these necessities, must resort to the owner thereof for payment; and in such a case, in a suit in the Court of Admiralty to condemn the ship for nonpayment of the money, the courts of law will grant a prohibition; and, therefore, if the owner, after money thus laid out, mortgages the ship, though it be to one who has notice that the money was so laid out and not paid, yet such mortgagee is well entitled, without being liable for any of the money thus laid out for the benefit of the ship as aforesaid." In *Buxton v. Snee*,¹² where a similar attempt to the present was made by a person who had repaired a ship, to claim a

¹ Cowp. 636.

² 2 P. Wms. 367.

³ 1 Atk. 234.

⁷ Part 2, cap. 3, sec. 9.

⁹ 9 East. 426.

¹¹ 2 P. Wms. 367.

² Doug. 101.

⁴ 1 Ves. 194.

⁶ 7 T. R. 312.

⁸ 1 Doug. 101.

¹⁰ 1 Bar. & Ald. 575.

¹² 1 Ves. sen. 155.

lien on the proceeds of her sale, Lord Hardwicke states it as one of the questions in the cause, whether the money arising from [*98] the sale should be answerable to the * plaintiff; and then, after laying down the law, that the ship itself would not be liable, he proceeds to say, "If, therefore, the body of the ship is not liable or hypothecated, how can the money arising by sale be affected or followed, the one being consequential of the other? so that the foundation of an equity arising for the plaintiff, fails." In *Ex parte Shank*,¹ Lord Hardwicke went still further than in the preceding case, for there the person who had repaired the ship, and claimed a lien on it in consequence, had actually got the proceeds of the sale into his own hands; and yet Lord Hardwicke obliged him to refund it to the assignees of the owner, who was a bankrupt, and ordered him to prove under the commission for the amount due to him for repairs. It would be, indeed, utterly at variance to any analogy drawn from the doctrines of a court of equity, were a distinction taken between the article itself and the proceeds of it when sold. It was said, indeed, in the court below, that the appellants might have bailed the vessel in the present case, and then no question would have arisen: but what would be thought in the court of chancery, if it was asserted that an heir or residuary devisee was not entitled to the surplus of the money arising from a sale, under its decree, of land charged with the payment of debts or legacies, because he might have prevented that sale by payment of the charges out of his own pocket?

The whole of the arguments, indeed, on which the court below rested its decree, depended upon the circumstance of payments having been made to material men out of proceeds remaining in its registry. The principal reported case in which this has [*99] been previously *done, is *The John Jackson*.² In that case, however, not only was the whole proceeding *ex parte*, but Lord Stowell drew an express distinction between the case of a British owner, as in the present case, against whom the material men could obtain redress in another court, and that of a foreign owner, as in that case, against whom they could have no other remedy; and on a subsequent application in the same case,³ he rejected the petition, on the ground, "that the Court of Admiralty would not attempt to interfere where the demand itself was the subject of a dispute, which the powers of a Court of Equity were alone competent to settle." In the later case of *The Maitland*,⁴ where the

¹ 1 Atk. 234.² 3 Rob. 288.³ Ibid. 292.⁴ 2 Hag. Adm. R. 253.

owners appeared and opposed the applications of the material men to be paid out of the proceeds in the registry of a sale of a ship, Sir Christopher Robinson decided that the demand could not be sustained, after observing, "that there did not appear to be any solid distinction between original suits, and suits against proceeds in cases that are opposed; whereas in cases unopposed, the exercise of a judicial discretion, in permitting bills of this kind to be paid out of unclaimed proceeds, instead of being indefinitely impounded, may be a sound discretion, and capable of being justified to that extent, notwithstanding the general prohibition." It is observable, that all the other cases that have been discovered, in which payments have been directed by the Court of Admiralty of late years to material men, out of proceeds in its registry, such as *The Wharton*, *Barbara*, *Adventure*, *Bombay* and *Unity*,¹ have been either unfunded, * or the payments have been consented to by the [* 100] owners.

Thirdly, The appellant had, by taking possession of the vessel under his mortgage, acquired such an absolute interest in it as entitled him to be considered as the owner in the Court of Admiralty. The 45th section of the 6 Geo. 4, c. 110, provides that no mortgagee of a ship shall, merely by reason of the transfer by way of mortgage to him, be deemed to be the owner of it, but that the mortgagor shall not be deemed by reason thereof to have ceased to be the owner, any more than if no such transfer had been made, except so far as may be necessary for rendering the ship available for the payment of the mortgage debt. This provision was intended for the benefit of mortgagees, and to free them from all liability in respect of the repairs or expenses of the ships mortgaged whilst they were not in possession of them; and the 46th section still further protects them, by declaring that their rights shall not be affected by the bankruptcy of the mortgagors, although they may have in their possession or be the reputed owners of the ship. When, however, a mortgagee, as in the present case, has taken possession of the ship, he becomes the legal owner of it, for something more has been done than the mere transfer by way of mortgage, and the provisions of the 45th section no longer apply to him, and the Court of Admiralty is bound, therefore, to recognize his rights. In the case of *The Flora*,² the delegates recognized the title of a sheriff who was in possession of a vessel under a writ of *fieri facias* at the time that it was seized under a decree of the Court of Admiralty, and ordered the

¹ See a note of these cases, *post*, p. 110.

² 1 Hagg. Adm. R. 198.

[* 101] * remainder of the proceeds of the sale, after payment of the wages in respect of which it was seized, to be paid over to him. The legal title of a mortgagee in possession is surely as strong as that of a sheriff under an execution; and there is no decision which at all militates against the apparent duty of the Admiralty Court to notice it, for it retains a jurisdiction over causes of possession, (Warrior.)¹ Where, indeed, a mortgagee has not been in possession, that court has refused to interfere, as in the cases of *The Portsea*,² *The Exmouth*,³ and *The Fruit Preserver*,⁴ because it has no original jurisdiction over contracts under seal, and its power is not extended in that respect by the 6 Geo. IV. Here, however, the contract was executed, and the mortgagee having become the legal owner of the ship previous to its sale, was entitled to demand the whole of its proceeds, excepting what the Court of Admiralty had legal power of distribution over.

By the general law of the land, no creditors are allowed to sue in the Admiralty Court, unless the contracts, under which they claim, were made *super altum mare*.⁵ According to Lord Holt,⁶ indeed, it is by a mere indulgence, and expressly against the statute of Richard II., although now *communis error facit jus*, that seamen are permitted to sue in it for their wages, because the remedy there is easier and better. A similar reason may be assigned for its jurisdiction in cases of bottomry bonds. No reason can, however, be assigned for giving it a jurisdiction in the case of debts, either by simple contract or specialty, which have been incurred for [* 102] the * fitting out of a ship. If it has exercised such a jurisdiction it is clearly an usurpation; and, as is stated by Lord Stowell in *The Zodiac*,⁷ "the doctrine which supported it was finally overthrown by the courts of common law, and by the highest judicature of the country, the House of Lords, in the reign of Charles II."⁸ The inconvenience of giving a jurisdiction of this

1 2 Dodson, 288.

2 2 Hagg. Adm. R. 84.

3 2 Hagg. Adm. R. 88.

4 2 Hagg. Adm. R. 181.

5 Com. Dig. tit. "Admiralty." E. 10 and 115.

6 Clay v. Sudgrave, 1 Salk. 34.

7 1 Hagg. Adm. R. 325.

8 There does not appear to have been any case decided upon this subject in the House of Lords in the reign of Charles II.; but in the 14 Car. II., a Bill "for settling the jurisdiction of the Court of Admiralty," was read for the first time in that House on the 3d February, 1661, Lords' Journals, vol. xi. p. 375; it was read a second time and referred to a committee on the next day, (Ibid. p. 377,) at which Mr. Justice Hyde and Mr. Justice Twysden were ordered to attend. On the 24th of the following March, the Earl of Portland brought up the report of the committee, approving of

kind to a court which has no power of examining witnesses *viva voce*, or of directing an issue, and which proceeds by different rules of evidence from the courts of common law, is very obvious, especially over a body of creditors who seldom have their contracts * reduced into writing, and whose demands being for [* 103] the supply of totally different articles, such as provisions, sails, cordage, &c., furnished by different persons at different times, could not be made the subject of one suit, as seamen's wages are. The affirmance, indeed, of this decree would alter the rights of all persons connected with the shipping of England, and introduce a new system of law utterly at variance with that under which our commerce has had its origin and continued to flourish.

The King's advocate, (Sir *D. Dodson*,) and *Lushington*, (Dr.,) for the respondents.

By the civil law, and the laws of Oleron, which have been generally adopted by the nations of Europe as the basis of their maritime law, whoever repaired or fitted out a ship had a lien on that ship for the amount of his demand. It is useless to cite authorities on this head, for they are undoubted, and are all collected in a note in Lord Tenterden's "Treatise on Shipping," Part 2, cap. 3, sec. 9. The United States of America have in a great measure followed the civil law.¹ In England the same law prevailed long after the passing of the statute of Richard II.; for in the resolutions respecting the jurisdiction of the Admiralty, subscribed by all the judges in 1632, it is specially provided, "that if suit be in the Court of Admiralty for building, amending, saving, or necessary victualling a ship against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be

the Bill, with amendments, and it was recommitted, (*Ibid.* pp. 415, 416); but nothing further appears to have been done with it. In the 22 Car. II., a Bill for "declaring and ascertaining the jurisdiction of his Majesty's Court of Admiralty, in marine causes," was read for the first time on the 12th March, 1669, (*Lords' Journals*, vol. xii. p. 307,) and on the 14th of the same month, read for a second time and referred to a committee, before which the Chief Justice of the Common Pleas, Justice Twysden, Baron Turner, the Judge of the Admiralty, Sir William Turner and Sir Walter Walker were to attend, *Ibid.* p. 308. It was before this committee, most probably, that Sir Leoline Jenkins, then judge of the Admiralty, delivered the argument which is printed in page 80 of the first volume of his life, by Sir William Wynn. No report, however, appears to have been made by this committee during that session of Parliament, and no bill upon the subject was subsequently brought in.

¹ See the authorities cited in a note to this case, 3 Hagg. R. Adm. p. 14.

[* 104] granted, though this be *done within the realm.¹ In the reign of Charles II., however, suits of this kind in the Admiralty, notwithstanding the able arguments of Sir Leoline Jenkins both at the bar of the House of Lords² and in his memorial³ to the king in council, were stopped by prohibition from the courts of common law; and since that time, although Lord Mansfield expressed himself strongly in favor of them in *Rich v. Coe*,⁴ and *Farmer v. Davis*,⁵ there is no doubt but that the Court of Admiralty has no jurisdiction to entertain a suit by material men against the ship itself.

With regard to the proceeds, however, remaining in the registry of the Court of Admiralty after a sale of a ship under its undoubted jurisdiction, for the payment of the seamen's wages, there is no case in which a prohibition has ever issued from any court of common law to prevent the distribution of them, according to the rules of civil law, amongst the persons who have contributed to her repairs or preservation. Very different considerations apply to the proceeds to those which would apply to the ship itself. The policy of the law of England is, that ships should not be detained in port during the litigation of contested demands. According to the old maxim, "ships were made to plough the ocean, and not to rot in port." No detriment, however, could arise to the commerce of the country by enforcing a lien against the proceeds, whilst the ship herself,

[* 105] released by the sale from the hands of *the marshal, is ready to be employed in traffic. If the law is settled that tradesmen have no lien at all on vessels for the repairs or provisions they have furnished in England, it will in many cases put foreigners in a much better situation than our own subjects. Suppose, for instance, a ship built in France, repaired in England, and afterwards sold in France or America under a decree of a French or American court, the proceeds will be divided amongst the creditors according to their demands, the justice of which must be ascertained according to the *lex loci contractus*; and consequently the French material men would be paid to the exclusion of the British. Of late, however, the courts of common law have rather leaned to encourage liens; as in *Franklin v. Hosier*,⁶ where the Court of King's Bench held, that ship-

¹ These resolutions are printed in Brown on the Civil Law, vol. 2, cap. 4, p. 78, and more fully in Prynne on the 4th Institute, cap. 22, p. 100.

² Life of Sir L. Jenkins. vol. i. p. 80 and 84.

³ Ibid. vol. ii. p. 746.

⁴ Cowp. 636.

⁵ 1 T. R. 109.

⁶ 4 Bar. & Ald. 341.

wrights had a lien on the vessel itself whilst it remained in their possession.

Little weight can be attached to the arguments that have been drawn from the decisions in the court of chancery which have been cited. The difference of jurisdictions between the two courts of chancery and admiralty, the one proceeding *in personam*, the other *in rem*, would sufficiently account for the difference in decision; and Lord Stowell must have been perfectly aware of those cases when he determined the case of *The John Jackson*; and yet, by his judgment there, he must obviously have considered that they ought not to have influenced him. All those decisions, indeed, proceed upon the doctrine, that material men have no lien upon the ship itself, (which cannot now be controverted,) or upon the proceeds of the ship when sold under a *decree of the Court of [*106] Chancery or a commission of bankruptcy; but they none of them touch the present question, which is, whether they have not a lien upon the proceeds of a ship sold under the decree of the Court of Admiralty, and which can only be determined by the law and practice of that court, unless where that law is restrained by or opposed to the courts of common law. Natural equity would certainly be in favor of the lien of material men, who would otherwise see their own unpaid-for goods sold to strangers, without being allowed to participate in any part of the produce of the sale.

There can be no doubt of the practice of the Court of Admiralty in cases of this description. From the date of the decree in *The Wharton*, in 1761, to the year 1832, a series of precedents have been produced, showing the constant practice of the court to allow the lien of material men on the proceeds of sales under its decrees. The decision of Lord Stowell, (a judge so careful not to exceed his jurisdiction, that no prohibition ever issued against him during the whole time he held the office, from 1798 to 1827,) in *The John Jackson*, would by itself be sufficient authority as to the existence and legality of it; and no inference can be drawn from the fact alleged on the other side, that these decrees were all made in unopposed suits. The very circumstance of the law being established would prevent owners from coming in and offering a hopeless opposition. The *Maitland*¹ is no authority against the practice; for in that case not only were the accounts of the material men disputed, which has not been attempted here, but the owner appeared and contested the demand, which it would have been very inequi-

¹ 2 Hagg. Adm. R. 253.

[*107] table to have enforced * against him, as the supplies had been furnished at the time that the ship had been chartered for three voyages to other persons who had become bankrupt and against whom he could only have recovered a dividend. In the present case, however, no owner appears, and unless the law of the court has been altered since the decisions in *The Portsea*, *Exmouth*, and *Fruit Preserver*, it cannot recognize a mortgagee as a party entitled to appear before it. The statute of 6 Geo. IV., c. 110, in fact, has the effect of preventing a mortgagee, whether in possession or not, from becoming an owner; for the 45th section provides, that "the person or persons to whom such transfer (mortgage) shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not, by reason thereof, be deemed to be the owner of such ship or vessel;" and then it proceeds to declare further, "nor shall the person or persons making such transfer be deemed, by reason thereof, to be an owner or owners of such ship or vessel any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred available, by sale or otherwise, for securing the payment of which such transfer shall have been made." And the 46th section goes on to declare, that the right or interest of the mortgagee shall not be in any manner affected by the bankruptcy of the mortgagor, and shall be preferred to any right, claim, or interest of the assignees. The mortgagor, therefore, still remained the owner of this ship when she was seized, although his rights were liable to be defeated by the sale or other disposition of her by the mortgagee, in order to ren-

[*108] der her available for the payment * of his debt. No owner is, therefore, now before the court, and no other person is entitled to oppose the application. Had the mortgagee, indeed, come forward and bailed the ship, there would have been an end of the question. This, however, he did not choose to do; and as a sale under a decree of the Court of Admiralty binds the right even of the crown, (*Attorney-General v. Norstedt*,)¹ he cannot complain of the situation in which he now is.

There can be no difficulty, as has been imagined on the other side, in taking the accounts or ascertaining the demands of material men in suits of this nature. They will be referred to the registrar and merchants, to whom, in cases of bottomry bonds and prizes, questions of a similar and frequently of a much more complicated nature

¹ 3 Price, 97.

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are constantly referred, and who have always given great satisfaction by the way in which they have performed the duties assigned to them.

This court is now sitting as a Court of Appeal from the Court of Admiralty. In a question exclusively relating to its law and practice, they can only be guided by the law which has been constantly adopted, and the practice which has been without deviation followed in that court. It is not for them to inquire what would be the course pursued by the courts of common law were a prohibition allowed; and it is undoubted that no prohibition has ever issued to prevent a practice of the nature in question. It is to be hoped, therefore, that they will follow the line of precedents which have been furnished by Lord Stowell and the other judges of the Admiralty, and affirm the decision of the court below.

* *Holt*, (K. C.) in reply:

[* 109]

This court, sitting as a Court of Appeal from the Court of Admiralty, is bound as much to act according to the law of the land, as the Court of King's Bench would be, if this case were brought before it by an application for a prohibition.

[BOSANQUET, J. "We are bound to restrain the Court of Admiralty, as much as the Court of Admiralty ought to have restrained itself."]

If, then, the Court of Admiralty would be restrained from giving a material man satisfaction of his demands out of the ship, it must be equally restrained from giving it to him out of the proceeds of the ship; for, as Lord Hardwicke¹ says, "if the body of the ship is not liable or hypothecated, how can the money arising from the sale be affected or followed, the one being consequential on the other? There is no difference in principle between the Courts of Admiralty and Chancery as to conversion; they both hold that the proceeds of a thing sold must be subject to the same equities as the thing itself previous to sale. If, indeed, the Court of Admiralty did not do so, what lien would there be on the proceeds of this ship? If there was no lien, on what ground is the present decree attempted to be supported? It is true, that the original jurisdiction of the Court of Chancery is *in personam*, but it has, also, an auxiliary jurisdiction *in*

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rem,¹ by virtue of which it appoints receivers, and directs the sheriff to deliver over possession of lands.

If the decree in the present case is affirmed, it will have [* 110] the effect of giving the Court of Admiralty a power * to try questions triable at common law, in direct opposition to the statutes 13 and 15 Rich. II., and 2 Hen. IV., the view, tendency and purport of which is, as stated by Lord Mansfield, in *Lindo v. Rodney*,² to prevent that court from trying them. This *dictum* is fully warranted by Lord Coke's Institutes, part 4, cap. 22, p. 135, and 2 Roll's Abridgment, 287. The only cases in which the Court of Admiralty has ever been allowed to exercise any jurisdiction over contracts, are seamen's wages, which is a matter of indulgence, and bottomry bonds, which, being executed in foreign countries, must be judged of according to the rules of civil law, and not of our own common law. The same reasons which have always operated upon the Court of King's Bench, to prohibit the Ecclesiastical courts from hearing objections to a churchwarden's accounts, as in *Leman v. Goulty*,³ and from receiving exceptions to an inventory, as in *Henderson v. French*,⁴ must be equally strong against permitting the Court of Admiralty, with a similarly defective jurisdiction, to proceed to decide upon contracts made in England, and which ought to be judged of solely according to the common law of the land in which they have been made.

At the close of the argument the case was adjourned for consideration, and the proctors were desired to furnish the court with notes of the unreported cases that had been cited in argument.⁵

¹ Fonblanque on Equity, cap. 1, sec. 6, p. 35.

² 1 Dougl. 615.

³ 3 T. R. 3.

⁴ 5 Maule & Sel. 406.

⁵ Notes of seven cases, including *The Adventure*, 3 Rob. 290, and *John*, 3 Rob. 288, were furnished by the proctors to the Judicial Committee. The five unreported cases were:—

The Wharton, January, 1761.—The ship was sold at the suit of the surgeon, and after the proceeds had been paid into the registry, and he paid thereout, two actions were commenced against the remaining proceeds by material men. The judge, on motion supported by affidavits, decreed the following sums to be due to the parties, with costs; Messrs. Bedd, Ede & Co., as furnishers and fitters out, 183*l.* 8*s.* 7*d.*: Messrs. Ede & Co., ditto, 68*l.* 11*s.* 5*d.* The remaining proceeds were paid out to the assignees of the owners, who had become bankrupts. No appearance was given for the owners or assignees.

The Barbara, 1761.—The ship was sold at the suit of the mate. Afterwards, Messrs. Ede & Co., the furnishers and fitters out, on motion, arrested and received the whole balance remaining, of 82*l.* 4*s.* No appearance was entered on the part of the owners.

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* The chief judge of the court of bankruptcy :

[* 111]

In this case, the ship Neptune was, in May, 1832, arrested under warrants in different actions in the High * Court of [* 112] Admiralty, at the suit of the mariners, for their wages. At the time of the arrest, the ship was in the possession of the appellant, William Hodges, who had previously taken possession of the ship and her register, by virtue of two several deeds of mortgage, executed by the owner while the vessel was at sea, as a security for debts due to Hodges to the amount of 8,000*l.*; and on the 1st of June, Hodges procured an indorsement of his mortgages to be made on the register, according to the provisions of the registry acts. No appearance, however, was given in the Admiralty Court, either for the owner or the mortgagee, and the ship was therefore sold in the usual way, under the directions of the court, and the proceeds of the sale were deposited in the registry.

After payment of the wages and costs in the several actions, there remained, in the registry a balance of about 4,000*l.*, which was arrested at the suit of Messrs. Sims & Co., rope-makers, who claimed a lien thereon in respect of a debt of 361*l.* 11*s.* 3*d.* for cordage supplied by them for the use of the Neptune while lying in the port of London, prior to her last voyage from England in 1831. On the

The Harmonia, 1817. — This was a Russian-built ship, and although the sole property of a British owner, she was not entitled to a British register. The owner having become bankrupt, she was arrested for wages and sold with permission of the Russian consul, and the proceeds paid into the registry. After the wages and costs had been paid, a provision merchant applied to the court to arrest the proceeds for the amount of his account for provisions furnished to the ship, of 49*l.* 5*s.* 4*d.* The assignees of the owner opposed the motion by counsel, and the judge decreed to hear both parties on petition, but the assignees were advised by their counsel to abandon their opposition, which they accordingly did. Two bills, one to a provision merchant, for 49*l.* 5*s.* 4*d.*, and another to a brewer, for 50*l.* 13*s.* 6*d.*, were then paid out of the proceeds, and the remainder was paid to the assignees.

The Bombay, 1832. — This ship was sold for wages, and after payment of them and costs, various applications were made by material men. A proctor appeared on behalf of the owner, but after advising with counsel the opposition was abandoned, and different claims of material men for ropes, for carpets, and floor cloth, for coppering ship, for repairs of ship, for painting ship, for ironmongery, and for shipwright's work, amounting altogether to 540*l.* 0*s.* 3*d.*, were paid out of the proceeds, the remainder of which were taken out by the owners.

The Unity, 1830. — This ship was sold for wages, and after payment of them and costs out of the proceeds paid into the registry, a ship-builder, who had repaired the ship, arrested the remaining proceeds, and the judge ordered him the whole of them, amounting to 682*l.* 10*s.* 2*d.*, in satisfaction of his claim. There was no appearance by the owner.

8th of January, 1834, Mr. Hodges, in his character of mortgagee in possession, appeared in the suit instituted by Messrs. Sims against the proceeds, and denying their right, as material men, to payment of their claim out of the proceeds, prayed that the warrant issued at their suit might be superseded. The learned judge of the Court of Admiralty, after hearing the parties, decided in favor

[* 113] * of the material men, and pronounced the sum of 361*l.* 11*s.* 3*d.* to be due to Messrs. Sims & Co., and condemned the proceeds remaining in the registry in such sum and costs. Against this sentence, Mr. Hodges has appealed to his Majesty in council; and other demands having been in like manner preferred before the Court of Admiralty by other material men, for supplies furnished in England, their claims have, by agreement between the parties, been suspended, and made to depend upon the result of this appeal, in which the appellant seeks to have the decree in favor of Messrs. Sims & Co. reversed, and also to have the proceeds remitted, with a view to their being paid out to him.

Two questions, therefore, were raised and argued; first, whether these material men are entitled to any lien upon the proceeds remaining in the registry; and if not, secondly, whether Mr. Hodges, as mortgagee, is entitled to have the balance paid out to him.

The case was very ably argued before their lordships on the 12th of February last, when, in deference to the high character and long experience of the very learned judge who decided the cause below, and in consideration of the extensive importance of the question under discussion, not only to the parties interested in this suit, but also to the commercial world at large; their lordships postponed their judgment, that they might give the subject the deliberate attention it deserves, and carefully examine the several authorities that were brought under discussion in the argument, or that might be discovered upon further search amongst the records of the Court of Admiralty.

Their lordships have been since furnished with extracts [* 114] from those records which they have fully * examined; and

I am now commissioned by the members of the judicial committee, who were present at the argument, to declare their lordships' unanimous opinion, that the decree appealed from ought to be reversed, and that the appellant, as mortgagee in actual possession at the time of the seizure, is entitled to have the balance of the proceeds paid out to him.

It is conceded to the appellant by the judgment of the court below, and was admitted at the argument by the learned counsel for the respondents, that as the law now stands, material men without

possession have no lien upon a ship itself for supplies furnished in England, and that Messrs. Sims & Co. could not have prosecuted their suit in the Court of Admiralty against this ship in specie. But a distinction has been taken and relied upon between proceedings instituted by material men against the ship in specie, and proceedings after lawful arrest and sale of the ship, at the suit of the mariners, against the proceeds remaining in the registry. The principles upon which the learned judge of the Admiralty Court rested his opinion in favor of the material men, appear from the printed report of this judgment to be these, that when a ship has been arrested, and sold under process from the Court of Admiralty, that court, after satisfying the immediate object of the sale, holds the balance of the proceeds *in usum jus habentium*. That the *jus habentes* are to be ascertained according to the law of the court in which the fund is administered; that the law of the Court of Admiralty is the civil and maritime law, except in those points in which it has been expressly controlled by the municipal law of England; that, by the civil and maritime law, material men have a lien on the ship and proceeds; and that, although the municipal courts of England * have restrained proceedings in the Court of Admi- [* 115] ralty, at the suit of material men against the ship itself, for supplies furnished in England, yet that no prohibition has ever issued, with respect to suits against the proceeds, after lawful sale; that such suits have, on the contrary, often been instituted, and sentence pronounced in favor of material men, without either prohibition or appeal; that the reasons upon which the right of material men to arrest the ship in such cases has been repudiated by the law of England, are not applicable to the arrest of the proceeds after a lawful sale; and therefore that, as The Neptune was lawfully arrested at the suit of the mariners for their wages, and as the appellant did not intervene, as he might have done, to bail the ship and prevent the sale, he had, by his own default, acquiesced in the sale, and allowed the proceeds to come into the registry of the court, and thus, according to the rules and practice of the court, to become subject to the lien of the material men, from which the ship in specie would have been exempt; and the counsel for the respondent endeavored to support the decree upon the same grounds.

It seems to have been assumed, in the argument of this case, that, prior to the reign of Charles II., the law of England, as administered in our Admiralty Court, with respect to the rights of material men, corresponded with the civil and maritime law, as adopted and acted upon by the other nations of Europe; and that it was in the reign of Charles II. that the enforcement of those rights had, from

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motives of commercial policy, been first limited and restrained by the interference of the municipal courts, in prohibiting all proceedings against the ship itself. And the whole fallacy of the

[*116] respondent's arguments lies in this assumption ; * for it must be conceded to them that, if, by the maritime law of

England, persons furnishing supplies to ships in this country had, prior to the reign of Charles II., a lien on the ship for the amount of those supplies, not only would their right to arrest the proceeds of the sale remain unaffected by the prohibitions issued by the municipal courts, in suits against the ship itself, but such prohibitions would themselves have been indefensible upon any known principle of law, for no authority but that of the legislature could alter the law, or destroy the existing rights of the material men, by taking away their remedy. But the common law courts assumed no such power ; they did not affect to alter the law, or control the exercise of acknowledged rights, but they declared that the maritime courts had erroneously applied the doctrine of foreign maritime law to contracts made in this country, and denying that material men ever had, by the English maritime law in respect of such contracts, any lien upon the ship, or any preference over other simple contract creditors, they prohibited those proceedings which could only be justified by the existence of such a lien. It is unnecessary to enter into any detail of the cases upon this subject, the substance and result of which are concisely, and, in the opinion of their lordships, correctly stated by Lord Tenterden, in his admirable work on Shipping, and from which he deduces this summary :— " That a shipwright who has once parted with the possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessities for a ship, are not, by the law of England, preferred to other creditors, nor have any particular claim or lien upon the ship itself, for the recovery of their

[*117] * demands ;¹ and the reason of this, as the learned author states in an earlier passage, is, because the law of England never had adopted the rule of the civil law, with regard to necessities furnished here in England.²

If, then, material men never had any lien on the ship itself, in respect of supplies furnished in England, how could they ever acquire a lien upon the proceeds of the sale of the ship ?

The language of Lord Hardwicke, in *Buxton v. Snee*,³ seems to

¹ Abbott on Shipping, part 2, cap. 3, p. 134 of 4th edition.

² Ibid.

³ 1 Ves. sen. 154.

be decisive upon both branches of the proposition. In that case, the ship had been sold under the authority of the Court of Chancery, and the proceeds were in the hands of the registrar of that court. A party, by bill, claimed to be paid out of those proceeds a debt due to him, for repairs done to the ship in England; but Lord Hardwicke, though he began by saying that it was undoubtedly a harsh defence, dismissed the bill, so far as it sought any remedy against the body of the ship, or the money arising from the sale of it; and in the course of his judgment, after declaring that he knew of no case where the repairs, &c., had been held a charge or lien on the body of the ship, and citing the case of *Watkinson v. Barnardiston*,¹ as a direct authority to the contrary, he proceeds:—"If, therefore, the body of the ship is not liable or hypothecated, how can the money arising by sale be affected or followed, the one being consequential of the other?"

But it has been argued that, inasmuch as the Court of Chancery only proceeds *in personam*, and the Court * of [* 118] Admiralty *in rem*, the decisions in the former court do not necessarily conclude a similar question in the latter. It should, however, be remembered, that this is not a question of jurisdiction but of right; that the question is, whether material men have, by the law of this country, any lien or preferable claim, in respect of their debt, over other creditors, not in what court or by what means that claim is to be enforced. And besides this, in the case of *Buxton v. Snee*, the fund was in the hands of the registrar of the Court of Chancery, and was, therefore, as much under the direct and immediate control of the lord chancellor as the proceeds in the registry of the admiralty are under the dominion of that court. The cases of *Ex parte Shank*² and *Wood v. Hamilton*,³ are also authorities for the same position, that material men have no better claim against the proceeds of a ship, when sold, than they had against the ship itself in specie.

But it is said that the right of material men to be paid out of the proceeds in the registry has been established by a series of decisions in the Court of Admiralty, which have never been called in question, either by prohibition or appeal; and several cases were cited, some from printed reports, others from manuscript extracts from the original records in the Tower; and their lordships have been furnished with copies of those extracts. The result of all these cases, upon

¹ 2 P. Wms. 367.² 1 Atk. 234.³ Abbott on Shipping, part 2, cap. 3, p. 140, 4th edition.

examination, appears to be this. There are seven cases, between the years 1760 and 1833, in which the material men have arrested the balance of the proceeds remaining in the registry, and have [* 119] received payment * of their claims by order of the court.

In five cases out of the seven, there was no appearance on the part of the owners or their representatives; but in one of the five the assignees of the owners, who had become bankrupt, afterwards claimed and received the residue of the fund still left in the registry, after satisfying the demands of the material men. In the other two cases there was an appearance: in the one, by the owner himself; in the other, by the assignees of the owner, who had become bankrupt; and in both these cases the material men were first paid their claims, and the balance only was paid out to the owners and the assignees, but this appears to have been, in both cases, with the consent of parties, under the advice of counsel.

In the case of the solvent owner, who would be personally responsible for the debt, the course pursued was the most prudent he could adopt, whatever might have been his rights; since he only paid what in law he was liable for, and saved himself all further litigation on the subject. The other case, that of *The Harmonia*, in 1817, is the only case where the representatives of the owner appeared, and submitted to the claim of the material men contrary to their interest; but still this was but a sentence by consent, and rests upon no intelligible principle, and cannot, therefore, be put in competition with the chain of decisions by which the contrary doctrine has been established in other courts. And there is one case in the Admiralty Court, namely, that of *The Maitland*, reported in 2 Hagg. Adm. R., 253, in which Sir Christopher Robinson places the decisions above referred to in their true light. After some preliminary observations, he says, in p. 255: — “There does not seem to be any solid [* 120] distinction between original suits and suits * against proceeds, in cases that are opposed; whereas, in cases unopposed, the exercise of a judicial discretion by the court, in permitting bills of this kind to be paid out of unclaimed proceeds, instead of being indefinitely impounded, may be a sound discretion, and capable of being justified to that extent, notwithstanding the general prohibition.”

The only other argument suggested for giving to material men a lien against the proceeds, which they would not have had against the ship, is, that as the appellant had omitted to bail the ship, as he might have done, he must be taken to have acquiesced in the sale of it, and the application of the proceeds, according to the course and practice of the court. How far this inference may afford a justifica-

tion of payments made to material men whose claims are unopposed, it is not necessary in this case to decide ; but here the appellant intervened, to deny the right of the material men, and it would be rather a strong measure to infer a man's acquiescence in a payment which he expressly resists. Their lordships are therefore unanimously of opinion, that the claim of Messrs. Sims & Co. to payment out of the proceeds cannot be supported, and that the sentence pronounced in their favor must be reversed ; and then, adopting the principle correctly laid down by the learned judge of the court below, that the proceeds remain in the registry *in usum jus habentium*, according to the law administered in that court, their lordships are of opinion, as there is no further claim by any person having a lien upon the proceeds, that the balance should be paid over to the appellant, out of whose possession the ship was taken, and who, for the purpose of rendering the ship available for the payment of his debt, must be considered as the owner.

* But as the payment of the proceeds to himself formed [*121] no part of the appellant's claim in the court below, it will not be necessary for his Majesty to direct the transmission of the proceeds. It will be sufficient for their lordships to recommend that the decree in favor of the respondents should be reversed, and that the cause should be remitted to the Court of Admiralty, where the appellant may apply to have the proceeds paid out to him.

The appellant, accordingly, after the report had been confirmed, applied to the registrar of the Court of Admiralty, who paid out the proceeds to him.

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ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

[* 375]

* THE CLIFTON.

Richard Nugent Kelly and others, *Appellants*; and John Bushby and others, *Respondents*.¹

July 2, 1835.

The appearance of counsel, who had been previously engaged at the hearing of a cause, on the cause coming on again upon the reserved question of costs, the proctor who originally instructed him being present, and not objecting to his taking part in the proceedings, and the opposite party being thereby led to suppose he was properly instructed to agree to a final decree, held binding on the party for whom he originally appeared, so as to preempt an appeal previously lodged against the former decree.

THIS was a question respecting the appellants' right to appeal, under the following circumstances.

The cause was originally one of salvage, promoted by the appellant, who was commander of the Coast Guard station at Cairn Ryan, Stranraer, N. B., against the ship Clifton, of which the respondents were the owners, for services rendered to the ship and cargo in the month of April, 1832.

The suit was brought in the High Court of Admiralty in England, and the action entered on the 24th of November, 1832, endeavors having been previously made to effect an amicable arrangement of the salvors' claim, but without effect; and on the 22d of January, 1834, the cause came on for hearing, when the court, by interlocutory decree, pronounced the tender of 50*l.* theretofore made, on the part of the owners to the salvors, for their services to the ship,
[* 376] to *be sufficient, and at the petition of Fielden, the salvors' proctor, reserved the question of costs to the next court.

On the 15th of February, (the first by-day after Hilary Term,) Clarkson, the owners' proctor, by his counsel, prayed the court, in the presence of Fielden, to condemn Fielden's parties in costs. Fielden's counsel objected; and the judge having heard the advo-

¹ Present, Mr. Baron Parke, Mr. Justice Vaughan, Sir John Nicholl, and the Chief Judge of the Court of Bankruptcy.

The Clifton. 3 Knapp.

cates on both sides, condemned Fielden's parties in the sum of 50*l.*, *nomine expensarum*; and, at the petition of Clarkson, decreed the tender of 50*l.* so theretofore made, and then remaining in the registry of the court, to be paid out to him, in part discharge of such costs.

In the month of October following, Fenton, who acted with Fielden as the salvors' proctor, informed Clarkson that he had interposed an appeal from the decree of the 22d of January, 1834, and requested him to accept service of the inhibition and citation on behalf of the owners, which he, supposing the appeal to be regular, agreed to do; and accordingly, shortly after, Fenton called at Clarkson's office, and produced a minute admitting the service of the citation and inhibition, which, at his request, Clarkson signed.

The *præsertim* of the appeal, from the decree of the 22d of January, 1834, dated as interposed on the 24th of the same month, was as follows:—

“And more especially from the aforesaid interlocutory decree, whereby the said judge pronounced the said tender of fifty pounds, theretofore made by the owners to the salvors, for their services to the said ship, to be sufficient, and from every thing therefrom.”

No reference was made by either party, on the 15th of February, to the pendency of any appeal from the * decree [* 377] of the 22d of January, which was treated by the counsel on both sides as having been submitted to, and the question of costs only discussed. In conformity with which an entry was made in the registrar's book, and the cause considered as concluded.

On discovery of these circumstances, and that, by the proceedings of the 15th of February, the appeal, if pending, had been preëmpted, Clarkson demanded the minute for his appearance to be delivered up. This Fenton refused, and having brought in his petition of appeal to the Judicial Committee, Clarkson appeared under protest, and filed his act on petition. To this Fenton replied, and a rejoinder, rebutter, and surrejoinder, were respectively filed and supported by the attestation of both parties.

From these it appeared that, in the declaration of the 22d of January, the question of costs was the only question reserved; and on the 15th of February, 1834, all the parties, both counsel and proctors, being in court, the salvors' counsel brought that question under the consideration of the court, and having stated certain special grounds, which had been suggested and were admitted by Clarkson, induced the judge, instead of awarding the costs against the salvors, to condemn them in the sum of 50*l.* *nomine expensarum*, and, on the application of Clarkson's counsel, to decree the tender of 50*l.* there-

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tofore made and then remaining in court, to be paid out to him, in part discharge of his parties' costs.

It was insisted, however, by Fenton, that, at the hearing on the 15th of February, the owners' counsel inadvertently, and through error, stated that the judge had, by the decree of the 22d of January,

condemned the salvors in costs, or to that effect; and that [*378] thereupon one of the advocates, who had been counsel for the salvors at the previous hearing, did, without instructions, correct such erroneous statement, by informing the judge, as the fact was, that the question of costs had been expressly reserved, and that, too, as both Fenton and Fielden expressly made oath, without instructions to appear as counsel for the salvors, or without communication with them, (though it was admitted that they were both in court at the time,) took further part in the discussion, in pursuance of which the final order respecting the costs was made.

The appeal now came on for hearing before the Judicial Committee of the Privy Council.

Dr. Lushington, for the appellants.

Dr. Addams, for the respondents.

MR. BARON PARKE. Their lordships have considered this case, and they think, under its peculiar circumstances, and after what passed on the 15th of February, in the presence of Mr. Fielden, that the appellants must be held to have perempted their right of appeal.

It is their opinion, that what is stated by a gentleman appearing as the advocate of a party, in the presence and uncontradicted by the proctor of that party, must be considered as if it had been stated by an advocate instructed by the proctor, or by the party himself; because it would have the effect of inducing the other party to believe that such advocate was properly instructed in making that statement. The judge must have formed a similar opinion; and, under these circumstances, and a judgment given as to costs, and agreed to on the part of the owners, upon the supposition

[*379] that the definitive sentence already pronounced *is acquiesced in by all parties, their lordships are of opinion that the appellants ought to be considered as bound by it, and thereby precluded from appealing.

It may be the case, that Mr. Fielden had no intention of doing any act by which his right of appeal should be perempted; but he has so conducted himself as to induce the court and the opposing

The Clifton. 3 Knapp.

party to believe that he had no intention of appealing, and to act upon that supposition, and by that conduct he must be bound. He is in the same situation, therefore, as if he had done an act in court acquiescing in the decree, and his right of appeal is therefore taken away.

Their lordships believe that, under the circumstances of this case, the most merciful course for both parties is, that the cause should be thus put an end to, but they do not think proper to award any costs.

CASES

SELECTED FROM VOLUME I.

OF

MOORE'S PRIVY COUNCIL REPORTS.

[THE CASES SELECTED ARE THOSE IN ADMIRALTY.]

1836-1837.

CASES

ARGUED AND DETERMINED BEFORE THE

JUDICIAL COMMITTEE

AND THE

LORDS OF THE PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT OF ADMIRALTY
OF ENGLAND.

* THE ELIZA.

[* 5]

Joseph Lidwell Heathorn, *Appellant*; and Andrew Darling, *Respondent*.

May 30 and July 2, 1836.

The party taking a bottomry bond from the master of a vessel, requiring supplies for the further prosecution of her voyage, is bound to ascertain whether such supplies can be procured on the personal credit of the owner, before resort is had to a bottomry bond as security for their amount.

Semble, where a party has the means of knowing the fact, he is bound to show that he exercised reasonable diligence to ascertain it.

THIS was originally a cause of bottomry, civil and maritime, promoted and brought in the High Court of Admiralty, by Andrew Darling, of St. Helena, merchant, the legal holder of a bond of bottomry on the ship *Eliza*, her tackle, apparel, and furniture, bearing date the 8th October, 1833, for 520*l.* 8*s.* 6*d.*, and maritime interest thereon, at seven and a half per cent., making together the sum of 559*l.* 9*s.* 1*d.*, which bond was given by Henry Thomas Marshall, the master of the ship, to Saul Solomon, of St. Helena, merchant, for provisions, stores, and other supplies furnished, and advances of money made by him, to enable the ship to proceed on her voyage from St. Helena to the port of London; Saul Solomon having afterwards indorsed over the bond to the respondent, Andrew Darling, who became and was the legal holder thereof.

The circumstances of the case were as follows: — The ship, be-

The Eliza. 1 Moore's P. C. Rep.

longing conjointly to Joseph Lidwell Heathorn, the appellant, and John Samuel Groves, the former master, left London in the month of March, 1832, with convicts, under the command of Groves, on a voyage to New South Wales and Singapore, and back
 [*6] * to London, Marshall, the late master, being at such time chief mate.

Having landed the convicts at New South Wales, in the month of September following, the vessel proceeded in ballast to Singapore. On the 27th of November, whilst at sea, Groves, the master, died, and Marshall then took the command; and, having arrived safely at Singapore, on the 5th January, 1833, the names of the said Henry Thomas Marshall were duly indorsed on the ship's register. An assorted cargo of merchandise and three passengers having been then taken on board, on the 3d June following she sailed from Singapore, on her return to London, and, on the 4th October, arrived at St. Helena. Being in want of some provisions and stores, for the further prosecution of her voyage, Lewis Gideon, the agent at St. Helena of Heathorn, the then sole surviving owner of the ship, had an interview with Marshall, the master, and stated his readiness to supply the requisite provisions and stores, and to draw a bill on Heathorn for the amount, as he had been accustomed to do. It appeared, however, that Saul Solomon, of St. Helena, persuaded Marshall that, as master, he had a right to make his election, and further persuaded him to employ him, Solomon, to supply the stores, and give him a bottomry bond for the amount. Gideon protested, but in vain; and, in the result, Marshall gave Solomon a bond of bottomry on the ship, freight, and passage-money, for 520*l.* 8*s.* 6*d.* Gideon immediately sent information to Heathorn of the transaction, who thereupon refused to pay the bond. It appeared that, after the bond had been given, Solomon assigned it to the respondent, Andrew Darling, of St. Helena. It appeared, also, that
 [*7] there was some question * as to the nature and quality of the stores not corresponding with those agreed to be supplied; and it was also alleged that the quantity shipped was short of that charged for. The ship arrived in the port of London on the 23d December, 1833; and, as Heathorn had refused to pay the bond, proceedings were instituted in the High Court of Admiralty, to enforce payment thereof.

The circumstances and particulars of the above transactions were duly set forth in the act or petition, and subsequent pleading in the court below, and were supported on either side by affidavits.

In support of the validity of the bond, the affidavit of Solomon stated that, at an interview between him and Marshall, at his, Solomon's, house, the day after the arrival of the vessel in the port of St.

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Helena, having repeated an offer of his services made on the day previous by Moss, his clerk, he stated:—"That the late commander, Captain Groves, had been a very old acquaintance and good friend of his, and that he, Solomon, had transacted Grove's business, when he called at that island, in command of the ship Ferguson, in 1836; that Marshall replied, that a Mr. Gideon had come on board the evening before, (after Solomon's clerk had left the vessel, with his, Marshall's, order, for refreshments,) and having represented himself to be a friend of Heathorn, had offered his services; that a Mr. Carroll had also been on board the evening before, for the purpose of tendering his services, and had represented that he had likewise a recommendation in his favor, from or on the part of Heathorn; but that he, Marshall, not being aware of any instructions from the owners to apply to any particular individual as their accredited agent, but, on the contrary, knowing and being * well aware [* 8] that the late Captain Groves had intended to address himself, for the business of the said ship, to him, Solomon, had he lived until the arrival at St. Helena of the vessel, he, Marshall, preferred following the same plan which he knew the late commander would have adopted, and would therefore take from him, Solomon, what he might require for the vessel; that thereupon Marshall ordered from him, Solomon, such stores and provisions as the vessel stood absolutely in need of, to complete her voyage, and which accordingly were sent on board at various times, during the stay of the vessel in the roads of St. Helena." His affidavit also further stated:—"That the supplies and provisions furnished to, and the cash advanced for the ship, having amounted to a considerable sum, namely, 500*l.* and upwards, he informed Marshall that, under the peculiar circumstances of the case, that was, of his, Marshall's, having only succeeded to the command during the voyage, in consequence of the original commander's death, and of the considerable quantity of stores and provisions which he had stood in need of, for the use of the crew and passengers on board, and of the many disbursements it had been necessary to make on account of the said ship, he, Solomon, would be under the necessity of taking a bottomry bond, unless Marshall should be able to raise sufficient funds to defray the amount due, by drawing a bill upon the owners of the said vessel." The affidavit then stated:—"That, at the time of the arrival of the ship Eliza at St. Helena, the said Lewis Gideon was not known to Solomon, or to any person else, as far as he, Solomon, had been able to ascertain, to be the authorized and accredited agent of Heathorn.

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[* 9] * Moss, the clerk of Solomon, confirmed this statement of the interview with Marshall, the day after the arrival of the ship.

The respondent, Andrew Darling, a resident merchant of St. Helena, also made an affidavit, stating:—“That though he had been in the habit of cashing ship bills for several years, in the instance of the ship Eliza, from the death of Captain Groves, whom he understood to be part-owner of the ship, and from the ship being in a leaky state, he would not have given cash for a bill drawn for supplies, &c., without the further security of a bottomry bond being handed over to him.” Several other affidavits were put in, in support of the transaction, confirming the statement of Solomon and Darling.

Against the validity of the bond, Marshall made an affidavit, in which, after stating the circumstances of Groves, the master's, death, and the ship's arrival, on the 4th of October, at St. Helena, he proceeded to detail the circumstances of obtaining the supplies in the following manner:—“That the said ship being in want of provisions and stores, he, Marshall, had an interview with Gideon, the agent of Heathorn, the owner of the ship, in regard to supplying her with the requisite stores, for the further prosecution of her voyage to England, who stated his readiness to furnish the same; that he, Marshall, was also applied to by Solomon, to furnish the requisite provisions and stores; and Solomon sent on board the ship one tierce of Irish beef, and another of Irish pork, as samples; that, conceiving he had a right, as master of the ship, to make his election, and that he was not compelled to employ the agent of his owner, he agreed with Solomon to furnish such provisions and stores as were

[* 10] requisite; * and he also agreed to give Solomon a bottomry bond on the ship, as security for the repayment by the owner for the stores and provisions.”

Lewis Gideon, the agent of the appellant, swore:—“That the ship being in want of provisions and stores, as the agent of Heathorn, he immediately (on the ship's arrival) personally applied to Marshall, the master, for an account of what was wanted, at the same time informing him that he was ready and willing to supply the ship with every requisite, and to draw a bill, as usual, for payment, on Heathorn; that, notwithstanding the premises, Marshall declined to permit him to supply the requisite stores and provisions, stating that, as master, he had a right to employ what agent he pleased.” The affidavit then stated the dealing with Solomon, and “That it was well known at such time to Solomon that he, Gideon, was the accredited agent of the owner at St. Helena, he having him-

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self assured Solomon that, if he insisted on a bottomry bond, the payment thereof would be resisted by the owner, or words to that effect." Heathorn, the appellant, confirmed Gideon's statement of his being his accredited agent at St. Helena.

On the 30th January, 1835, the cause was heard in the court below, when the judge (Sir John Nicholl) pronounced for the validity of the bottomry bond, and condemned the appellant to answer the action against the ship, in the amount of the bond and in costs.

From this decision Joseph Sidwell Heathorn appealed. The case was argued on the 30th May, and reargued, at the desire of the court, by the senior counsel on either side, on the 2d July, 1836.¹

* *Dr. Adams and Bere*, for the appellant. The allega- [* 11]
 tions in the act or petition in this case are not supported by the evidence. The respondents make out no case of necessity for hypothecating the ship. Such necessity must absolutely exist; it is the principle upon which alone a bottomry bond can be supported. In the case of *The Rhadamanthe*,² Lord Stowell says:—"Such bonds are considered valid upon the ground of necessity only, and it is upon the same principle of necessity that a later bond is entitled to priority of payment over a former one." In the case of *The Nelson*,³ the same learned judge lays down the principle of their allowances more fully. "It is certainly the established principle of this species of bonds, that they shall have been taken where the owner was known to have no credit; no resources for obtaining necessary supplies. It is that state of unprovided necessity that alone supports these bonds; the absence of that necessity is their undoing. If the master takes up money from a person who knows that he has a general credit in the place, or at least an empowered consignee or agent willing to supply his wants, the giving a bottomry bond is a void transaction, not affecting the property of the owner, only fixing loss and shame on the fraudulent lender; but where honorably transacted, under an honest ignorance of the fact, an ignorance that could not be removed by any reasonable inquiry, it is the disposition of this court to uphold such bonds, as necessary for the support of commerce in its extremities of distress, and, as such, recognized in the maritime codes of all commercial ages and nations." The first

¹ Present on the second argument, Lord Lyndhurst, Mr. Baron Parke, Mr. Justice Bosanquet, the Chief Judge of the Court of Bankruptcy, Sir John Nicholl, and Sir Herbert Jenner.

² 1 Dodson, 203, 204.

³ 1 Hagg. Adm. R. 175.

The Eliza. 1 Moore's P. C. Rep.

question is, did not Solomon know that Gideon was the [*12] accredited *agent of Heathorn? The expression in his affidavit is, that, at the time of the arrival of the ship at St. Helena, Gideon was not known to him to be such accredited agent. The expression runs through the affidavits of the respondent's witnesses. Solomon's interview with Marshall was not till the day after the arrival of the ship; that is the period from whence the absence of such knowledge should be proved. But, in order to support the bond, they must go further, and show that the owner had no credit. Marshall's affidavit negatives such an assumption; it is nowhere contradicted. No one swears that Gideon was not fully prepared to advance on the personal credit of Marshall. Moss says only that he did not know Gideon was the accredited agent of Heathorn. Gideon himself says he applied personally, and offered to supply the necessary stores. It would be impossible to support this as a bottomry transaction, without sending to inquire whether the stores were advanced on the credit of the owner. That, however, is unnecessary; for it appears, on their own showing, to have been an advance on personal credit. That is fatal to such a bond. The *Alexander*;¹ The *Sydney Cove*.² In The *Augusta*,³ Lord Stowell says:—"Hypothecation bonds are founded on the security of the ship and freight; and, according to the law of this country, are resorted to only where there is a failure of personal security, in order to enable the master to supply himself in a foreign port with necessities, which he would otherwise be unable to procure; from that necessity they spring, and on the ground of that necessity alone are they supported."

[*13] * The supplies were not such as the ship stood in absolute need of; and, therefore, the agent was not justified in taking a bottomry bond. All the authorities concur, that the supplies must be necessary supplies. It appears, by the affidavit of Darling, that he took the bond because the ship was in a leaky state, yet knowing the ship to be in such a state, he gives the full value for the bond. Is that a credible state of things?

The *King's Advocate* (Sir John Dodson) and *Dr. Curteis*, for the respondent. It is clear that the vessel was in a state of necessity when she entered the port of St. Helena. It is nowhere stated that Gideon was the accredited agent of the ship; it rests upon the absence of a contrary statement; how then could Marshall be aware

¹ 1 Dodson, 278.

² 2 Ibid. 1.

³ 1 Ibid. 283, 286, 287.

The Eliza. 1 Moore's P. C. Rep.

of such fact? No supplies could be obtained but on a bottomry bond; the necessity of the ship justified the resort to such a security. The stores supplied were such as the vessel had immediate need of; they were, for the most part, sea stores. In *The Duke of Bedford*,¹ the judge of the Admiralty Court (Sir Christopher Robinson) says:—"With respect to sea stores, I see no reason for distinguishing them from any other supplies that may be necessary for the service of the ship." "*Pour les depens de la nef, s'il y a besoin de victuail-ler*,"—"in causâ necessitatis pro servandâ nave et bonis," according to the general definition given of these bonds by writers on maritime law. Solomon's ignorance of Gideon being the accredited agent, if he were such, is an honest ignorance, and not disproved by any evidence on the other side. As to the stores being supplied
*on a personal credit, there is no pretence for such an as- [*14]
sumption. A bottomry bond may be valid, though a bill of exchange were given at the same time by way of collateral security.² The resistance of the bond is an unrighteous act; the court below held it valid, and condemned the appellant in costs.

LORD LYNDHURST. We do not think this bond can be upheld. The question is, whether Solomon (for the respondent has no better right than he had) used due diligence to ascertain if Marshall, the master, could procure the necessary supplies without resorting to a bottomry bond. It appears to us that he was bound, in this case, to inquire if any person was willing to supply the goods upon personal credit. He had no right to fix the owner with a bottomry bond until he had made such inquiries, and had good reason to believe its absolute, and, therefore, its legal necessity. If he knew that Marshall might obtain the necessary supplies on the personal credit of the owner, there is an end to the case; and, having the means of knowing that fact, we think he is bound to show that he exercised a reasonable diligence to ascertain it. We do not think, from the evidence in this case, that he did use such diligence; and we are, therefore, of opinion that the judgment below must be reversed.

¹ 2 Hagg. Adm. R. 301.

² 1 Dodson, 466.

CASES

SELECTED FROM VOLUME II.

OF

MOORE'S PRIVY COUNCIL REPORTS.

[THE CASES SELECTED ARE THOSE IN ADMIRALTY.]

1837-1838.

CASES

HEARD AND DETERMINED BY THE

JUDICIAL COMMITTEE

AND THE

LORDS OF THE PRIVY COUNCIL.

ON APPEAL FROM THE VICE-ADMIRALTY COURT
OF GIBRALTAR.

THE CAZADOR.

William Sherwill, *Appellant*; ¹ and our sovereign lord the King, and
Iltd Nicholl, Esq., his Majesty's Procurator-General, *Respond-*
ents. ²

June 2 and July 11, 1836.

In order to render a party liable to the penalties for shipping goods to be employed in the slave-trade, he must be shown to have had a guilty knowledge of the object of the vessel. A person, though convicted of felony under the Slave Abolition Act, 5 Geo. IV. c. 113, s. 10, is capable of prosecuting an appeal against a sentence in the Vice-Admiralty Court for penalties, though his conviction in the Criminal Court was previous to the civil sentence, and he is, at the time of the appeal, undergoing the punishment awarded him by the former. A protest, on the ground of such conviction, overruled.

THIS was an appeal arising out of a cause of forfeiture promoted in the Vice-Admiralty Court of * Gibraltar, by [* 2] Lieutenant-General Sir William Houston, the lieutenant-

¹ This and the two cases following being decisions upon the same statute, it is thought advisable to place them together.

² Present: Lord Wynford, Mr. Justice Bosanquet, the chief judge of the Court of Bankruptcy, and the Right Honorable Sir Herbert Jenner, D. C. L.

The Cazador. 2 Moore's P. C. Rep.

governor, against the brig Cazador, whereof Pedro Felipe del Campo was the sole owner, and part owner of the cargo laden therein ; and also against Pedro Martinez, likewise part owner of the cargo ; and against Miguel Riera, the master ; whereby the said ship Cazador, her tackle, goods, wares, and merchandise laden therein, were declared to have been, at the time of the seizure thereof, fitted out, equipped, and despatched in the port of Gibraltar, to accomplish the object of shipping, embarking, receiving, obtaining, or confining on board the said brig, slaves or other persons, for the purpose of their being carried away or removed as, or in order to their being dealt with as, slaves ; and was decreed, with her tackle, apparel, and furniture, together with all goods and effects of the owners, or part owners thereof, to be forfeited to his Majesty : and against the further judgment of the court pronouncing for the penalties, and condemning Pedro Felipe del Campo, the owner, and Miguel Riera, the master of the brig, respectively, in the sum of 10,000*l.*, and Peter Martinez, and the appellant, William Sherwill, each in the like sum, being double the value of the goods and effects shipped by them respectively on board the said vessel, and condemning them also in costs.

The cause arose under 5 Geo. IV. c. 113, for amending and consolidating the laws relating to the abolition of the slave-trade.

It appeared from the evidence in the cause, that the brig Cazador arrived from Cadiz during the night of the 29th of March, 1835, in the port of Gibraltar, and reported herself as being bound to the island of St. Tomé, (on the coast of Africa,) and subsequently to [* 3] * the Havana. Having taken various goods on board, comprising, amongst other things, thirty-two cases of muskets, and six hundred barrels of gunpowder, which appeared by the bill of lading to have been shipped by the appellant, William Sherwill, for the account and to the order of Pedro Martinez ; and being about to sail, she was seized on the 1st of April, 1835, by order of the lieutenant-governor, for having been illegally fitted out and equipped in the port of Gibraltar for carrying on the slave-trade.

The seizure was made in consequence of the affidavit of Duncan Frederick Campbell, the acting captain of the port of Gibraltar.

Immediately upon such seizure, a minute inspection of the vessel, her cargo, and ship's papers, was made ; when it appeared that the vessel was in every particular fitted and equipped as a vessel for the transport of slaves, and that her fitting and equipment were not compatible with her employment in any other trade whatever. This was deposed to, with the facts and circumstances which had occurred in the port, and which led to the seizure of the brig, and unlivery of her cargo, by the further affidavit of Mr. Campbell.

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Various affidavits were also put in by the appellant, Mr. Sherwill, both on behalf of himself, and also as attorney for Pedro Martinez, accompanied by the bills of lading, and amount of the ship's provisions, claiming the restitution of such goods as had been supplied by them respectively, the seizure of which they insisted was illegal; and denying, both on behalf of himself as well as Pedro Martinez, that they had done any acts to render their goods liable to forfeiture.

In consequence of these proceedings, a monition was issued on the 2d June, against the appellant, *calling on [* 4] him to appear personally before the surrogate on the third day after service, and "then and there to show and allege, in due form of law, a reasonable and lawful cause, if he have or know any, why he, the said William Sherwill, should not be pronounced to have knowingly and wilfully shipped, laden, or put on board, or to have knowingly and wilfully been procuring, counselling, aiding, or abetting in shipping, lading, or putting on board the said brig or vessel called Cazador, money, goods, or effects, to be employed in accomplishing certain objects by the statute in that case made and provided, declared to be unlawful; that is to say, in accomplishing the object of dealing or trading, in purchasing, selling, bartering or transferring, or of contracting for the dealing or trading in purchase, sale, barter or transfer of slaves, or persons intended to be dealt with as slaves, or of shipping, transshipping, embarking, receiving, detaining, or confining on board, or of contracting for the shipping, transshipping, embarking, receiving, detaining, or confining on board the said brig Cazador, slaves or other persons, in order to their being dealt with as slaves, contrary to the statute in such case made and provided, and for such or other reasons subject and liable to be adjudged and condemned to pay the penalties due under the provisions of the said statute; and why the said penalties should not be accordingly pronounced for."

On the 9th of June, the advocate-general brought in the libel, setting forth the several charges for the offences alleged to have been committed by Mr. Sherwill, as well as the other parties, in breach of the act of parliament; and concluding by praying that the brig *and cargo might be pronounced to be forfeited to the [* 5] king, and the penalties due by law; that is to say, the sum of 10,000*l.* from each of the said parties, Pedro Felipe del Campo, Miguel Riera, William Sherwill, and Pedro Martinez, being double the value of the goods and effects shipped by William Sherwill and Pedro Martinez, and received or contracted to be received on board by Pedro Felipe del Campo, and Miguel Riera, the master.

To this libel the defendants severally appeared and put in their

The Cazador. 2 Moore's P. C. Rep.

personal answers, which were sworn to, and in which, after stating the various circumstances showing their connection with the vessel, they expressly denied all knowledge of the objects for which it was fitted up, or of the matters charged against them, from which such knowledge might be inferred.

Witnesses were examined in support of the libel and the answers of the several defendants, on behalf of whom further allegations in answer were brought in, the last of which on the part of the appellant denied all the circumstances deposed to, by which it was attempted to fix him with a guilty knowledge of the object and destination of the vessel; and in reply to a statement that he was apprised and warned that suspicions were entertained by the lieutenant-governor of the vessel's character, stated that the permit for shipping the gunpowder, though withheld on the 31st of March, was delivered to him on the day following, with a declaration by Mr. Campbell that the lieutenant-governor's suspicions respecting the vessel were removed.

On the 29th of September the cause came on for judgment, when the judge, having heard the proof read, rejected the claims [* 6] of Pedro Felipe del Campo * and Pedro Martinez, and by interlocutory decree pronounced the contents of the libel to be sufficiently proved, condemning the ship as forfeited, and the defendants severally in the full penalties claimed.

From this decree an appeal to his Majesty in council was duly interposed on behalf of William Sherwill.

Pending the above suit in the Vice-Admiralty Court, the appellant was proceeded against criminally by order of the lieutenant-governor, and having been arrested and committed, was indicted for having "piratically, feloniously, and unlawfully fitted out, equipped, despatched, and used the said ship Cazador, to accomplish the object of shipping, embarking, receiving, detaining, and confining on board slaves and other persons, for the purpose of their being carried away and removed in order to their being dealt with as slaves."

On the 25th of September, 1835, the day previous to the hearing of the cause in the Vice-Admiralty Court, the trial upon this indictment came on, when the same witnesses who had already been examined on depositions in the civil suit, were produced against the prisoner, and his personal answers to the libel read, and upon this evidence he was convicted and sentenced to be imprisoned for three years, and kept to hard labor.

The appeal having been duly admitted and referred to the judicial committee, the usual inhibition, citation, and monition, were issued, and returned into court, to which his Majesty's procurator-general appeared, under protest, and delivered in a petition, setting out the

various proceedings, and concluding, by way of protest, "that the said William Sherwill was *and had been, from [* 7] the time of the said conviction, undergoing the sentence of the law thereby imposed upon him, and that all his goods, chattels, and credits, so far as the same could be found, had been seized to the use of his Majesty ; that the inhibition and citation issued under the seal of this court, were decreed in ignorance of the fact of the said conviction of the said William Sherwill, and that the said William Sherwill, by reason of the premises, was legally incapable of appearing in judgment to prosecute that his pretended appeal. Wherefore the procurator-general prayed the court to pronounce for that his protest, and that the inhibition and citation issued in the aforesaid pretended appeal might be decreed to be relaxed."

The protest was accompanied by a record of the conviction.

June 2, 1836. On the appeal coming on, upon the protest,¹ Sir William Follett was heard in opposition, and the King's Advocate declining to press for the allowance of the protest, the same was overruled, the judicial committee observing,—That if the protest could be supported, the effect of the sentence in the criminal court would be to deprive the appellant of the only means by which he could satisfy the judgment in the civil suit, as when the sentence of imprisonment was satisfied, he would still be liable to the penalties, though all his effects were forfeited ; that there being no attainder, there was no personal disability to prevent the appellant being heard on his appeal, though the conviction might be a good bar to an action to recover back the penalties, *supposing he succeeded [* 8] in reversing the judgment of the Vice-Admiralty Court. The appeal was accordingly fixed for hearing on an early day.

Sir William Follett, K. C., and Dr. Phillimore, for the appellant. This is the first case which has arisen under the act of 5 Geo. IV. c. 113, which was passed for the purpose of consolidating the laws relating to the slave-trade ; being directed against a cruel and outrageous traffic, it requires, in proportion as its enactments are penal and severe, a strict and technical interpretation. There are two classes of offence contemplated by this act : one, the direct traffic in slaves on the high seas, which is declared piracy, and, as such, felony, punishable with death ; the other, the knowingly and wilfully engaging directly or indirectly in aiding or assisting, or contributing to the

¹ Present : Mr. Baron Parke, the Chief Judge of the Court of Bankruptcy, Sir John Nicholl, and Sir Herbert Jenner.

The Cazador. 2 Moore's P. C. Rep.

carrying on of the slave-trade; this latter is either punishable in the Civil Court with penalties, or in the Criminal Court with imprisonment or transportation. The 9th section provides for the capital felony; the 2d, 5th, 6th, and 7th sections declare the traffic in slaves illegal, and prohibit it under severe penalties; the 10th section makes such traffic criminal under certain circumstances. Now in all these cases a guilty knowledge is essential to the commission of the offences, whether it be capital, criminal, or merely subjecting the party to penalties; and the words "knowingly and wilfully," are to be found in every section not merely declaratory; thus, in the 5th, the knowingly and wilfully embarking capital in the slave-trade,—in the 6th, the knowingly and wilfully guaranteeing slave adventures,—in the 7th, the knowingly and wilfully shipping goods to be em-

[* 9] ployed in the slave-trade *is made subject to pecuniary penalties,—and in the 10th, the knowingly and wilfully being engaged in any of the above acts is constituted felony. It may be doubtful whether the legislature ever intended that a party should be liable to be proceeded against both in a civil and criminal suit, but there can be no question whatever that in either suit he must be proved to have had a guilty knowledge, and, accordingly, the libel here is expressly framed with that view, the charge being in the very words of the statute, that the appellant "did knowingly and wilfully ship goods," &c. Such knowledge is, however, expressly denied by Mr. Sherwill, who, in his personal answer, says he neither knew nor suspected that the vessel was equipped or intended for the slave-trade, and if he had ever entertained the most distant suspicion, the conduct of the government authorities was calculated to allay, if not destroy such, for they not only grant him permits to ship the goods on board, but they give them the very night before her seizure; nor is such knowledge brought home to him by any witness examined in the cause; and without such proof the courts below had no right to assume the appellant's guilt, or to amerce him in the heavy penalties which have been awarded against him.

The real secret of the admission of the libel can alone be accounted for by the unusual and unprecedented course which was taken upon the trial of the indictment. That trial was fixed on the day previous to the hearing of the cause in the Vice-Admiralty Court: it came on before the same judges, the lieutenant-governor being one of the commissioners. The witnesses who had been already examined on

these depositions were brought into court, and examined [* 10] again, *and the personal answers given in by Mr. Sherwill to the libel read, as a confession or statement of a prisoner in a criminal charge.

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The *King's Advocate* (Sir John Dodson) and *Dr. Burnaby*, for the crown. There is no doubt that there has been a wilful contravention of the act of parliament in this case, and the only question is, whether the appellant did not knowingly and wilfully ship the goods in question for the purposes of the slave-trade. A vessel employed in such trade, is, by the fourth section of the statute, expressly condemned, and the owners or part-owners are liable to be seized. On whom, then, is the *onus probandi*, the want of guilty knowledge? clearly not on the party seizing, but, as in all cases of the commission of a criminal act, on the party committing it: he must prove his innocence, or, at least, his want of participation, in that which constitutes the criminality of the offence. The language of section ten is the same as that in sections five, six, and seven, and the proofs must necessarily be the same, that dispose of the objection against the examination of the same witnesses. With respect to the court having allowed the appellant's personal answer to the libel to be read in the criminal suit, there is no evidence of that fact, and if there were, it would only amount to a plea of not guilty; for he denies the allegations, that is, that he did ship the goods on board, &c., knowingly and wilfully, and if his bare denial is to impose the necessity of proof of such knowledge, not to be inferred from the circumstances of the case, there can be no conviction under the act. But this is a civil not a criminal proceeding, and the same rule must apply to the seizure of the goods and the penalties incurred * as if they had been in [* 11] a foreign vessel sailing under British colors, in which case it has been expressly decided that the *onus probandi* is on the claimants, not on the seisor.¹ By 7 and 8 Geo. IV. c. 30, s. 11, the exhibiting false lights with the intent to bring any ship or vessel into danger, is a capital felony; how is such intent to be proved but from the circumstances of the case? If, upon an indictment, the personal plea of the defendant of not guilty is to be an answer to the charge, there would be an end to all prosecutions for the offence,—the *onus* of proof of innocence must be on the party accused: here an illegal act has been committed, the appellant is *particeps criminis*, he does not deny his participation, but says he did not knowingly and wilfully ship the goods, and he calls on the seisor to prove his knowledge, which, if not an inference from the act itself, is sufficiently established from the evidence; there was enough in the appearance and conduct of the vessel to have put any reasonable man on his guard, and if he is ignorant only because he shuts his eyes, he wilfully incurs the consequences of his own act.

¹ The Beaver, 1 Dodson, 152.

LORD WYNFORD. Before I apply myself to the particular case which is now under our consideration, I am directed by their lordships to state, that no inference is to be raised with reference to the proceedings which have been alluded to in the criminal suit against the appellant, from the judgment which we are about to give in this, the civil suit; we are only to decide on the case which is presented to us.

I, for one, am exceedingly sorry that the two cases have [* 12] been mixed up together; it * would have been much better if it had been avoided. There cannot be a doubt, I think, that there is a great deal of suspicion about this case. But I entirely agree with the appellant's counsel, that we are not, in this case, or any other criminal case, to decide on suspicion, and that the more serious the offence is, the greater should be the caution of the judges before they condemn. We think that this case does not go beyond suspicion. It is a case that proceeds on the 7th section of the 5th of Geo. IV. c. 113, by which it is enacted, "That if any person shall knowingly and wilfully ship, transship, lade, receive, or put on board, or contract for the shipping, transshipping, lading, receiving, or putting on board of any ship, vessel, or boat, any money, goods, or effects to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful, then, and in every such case, the persons so offending, and their procurers, counsellors, aiders, and abettors, shall forfeit and pay for every such offence, double the value of all the money, goods, and effects so shipped, transshipped, laden, received, or put on board." The counsel for the crown has said, Is ignorance to be any excuse? Indeed, ignorance is an excuse; not wilful ignorance, if it can be shown to be such; but ignorance is an excuse, and must be, because, by the words of the statute, unless there is knowledge there can be no guilt, and where there is complete ignorance there certainly is not that knowledge which would be required to convict. I do not mean to say that it is necessary that you should have express evidence of knowledge, knowledge may be inferred in this and in every other case.

And that brings us to the real question in the case, whether [* 13] * there is sufficient ground to infer more than suspicion, whether there is sufficient ground to infer that criminal knowledge, which would bring the party within the reach of this highly penal act of parliament.

Now take it as it is charged in the 7th section of the libel; that suspicion arose on the 30th March, 1835, that the vessel was engaged in illicit traffic; on the 31st, that suspicion appears to have been considerably increased, so much so, that on that day, there having been

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some little examination in the interim, the lieutenant-governor refused to grant the permit for the shipment of the gunpowder. On the 1st of April, it appears distinctly that the suspicion, such as it existed on the 31st of March, was lulled, if not entirely removed; for, on that day, the lieutenant-governor granted the permit to ship the gunpowder. I cannot conceive it possible that he would have granted that permit if his suspicions, which existed on the 31st of March, had not been got rid of on the 1st of April.

The answers that have been given by this gentleman (Mr. Sherwill) upon oath, to the interrogatories and questions that were put to him, have been put in on his behalf. Whether those questions were properly put to him, in a proceeding of this sort, I do not know; I should be very sorry to be obliged to decide that they were. But it is enough to say, that in this case it is perfectly immaterial; because, whether those questions were properly put or not, the answers are undoubtedly in his favor. At first it struck me that he did not swear in the sort of way, in his affidavit, particularly, that I should have expected a man in his situation to swear. He put his knowledge a little too much upon the correspondence which had taken

*place between him and his employers; he does not dis- [* 14]
tinctly deny that he might not have had knowledge from some other communication. But when he comes to be examined in answer to one of the questions that were put to him, he upon his oath distinctly states that he had no knowledge whatever of this ship being about to be despatched on a slave voyage. Whether right or wrong, those who proceed for this penalty have thought proper to put in this evidence; they have made it evidence, and the appellant has a right to take advantage of it. But I beg leave to say, that it strikes me that there is nothing in this case to weigh down the positive testimony obtained from this man. We have here direct evidence that he did not know; we have no direct evidence that he did know; we have no circumstance from which we can fairly infer that he did know.

I am bound, therefore, in justice to my opinion, and their lordships instruct me so to say that there is not that proof of knowledge which will warrant this court in supporting the judgment that has been given by the court below for this penalty. The court, therefore, are of opinion that this appeal must be allowed.

ON APPEAL FROM THE VICE-ADMIRALTY COURT AT GIBRALTAR.

[* 15]

* THE CAZADOR.

Pedro Felipe del Campo, and Pedro Martinez, of Cadiz, merchants,
Appellants, v. our sovereign lady the Queen, and Ilted Nicholl, Esq.,
 her Majesty's procurator-general, *Respondents*.¹

July 5, 1837.

The receiving goods on board a slave-ship, is the joint act of the owner and master of the vessel; and the penalties given by 5 Geo. IV. c. 113, s. 7, are in such case joint and not several.

The owner of a vessel, though a subject of the Queen of Spain, and resident at Cadiz, is liable to the forfeitures and penalties incurred under the Slave Abolition Act, if his vessel came within a British port.

THIS was the appeal of the other defendants in the last case, the circumstances of which are there fully detailed.

On the 28th of September, 1836, an inhibition issued under the seal of this court, upon an appeal, so far as the same rejected the claims, and condemned the ship, and the property, goods, and effects of the owner thereof: also so far as the same condemned Pedro Felipe del Campo, and Pedro Martinez, in the penalty of 10,000*l.* each, and in costs.

The appellants prayed their lordships to reverse the decision of the Vice-Admiralty Court at Gibraltar, for the following reasons:—

1. Because the ship, and the goods belonging to the owner of the ship, could not be liable to confiscation and forfeiture, unless the violation of the statute, 5 Geo. IV. c. 113, be established by adequate proof.

[* 16] 2. * Because Pedro Felipe del Campo, and Pedro Martinez, being natural born subjects of her Majesty the Queen of Spain, and not resident within the dominions of his Britannic Majesty, could not be rendered liable to penalties imposed by an act of the British legislature.

The King's Proctor, on the other hand, prayed the court to affirm the decision of the court below, and remit the same; and that the

¹ Present: Lord Brougham, Mr. Baron Parke, Sir John Nicholl, and the Right Honorable Sir Herbert Jenner, D.C.L.

appellants should be condemned in costs for the following reason :—

Because The Cazador was fitted out and equipped for, and bound upon a slaving voyage to the coast of Africa at the time of her seizure in the port of Gibraltar: and that the goods and effects laden on board the said ship, in the said port, by or under the authority of the appellants, were shipped to be employed in such illegal voyage contrary to the provisions of the act of parliament for the abolition of the slave-trade; and that the same and every part thereof were justly liable to forfeiture and condemnation: and that the penalties pronounced by the court below to be due from the appellants, were justly and legally incurred.

Dr. Lushington and *Dr. Phillimore*, for the appellants,—contended, upon the grounds contained in their second reason, that the Act 5 Geo. IV. c. 113, applied only to persons who were themselves within the jurisdiction; that the Vice-Admiralty Court had no power to decree the penalties against Del Campo, who was resident in Cadiz, a subject of the Queen of Spain: that Pedro Martinez was an accessory after the fact, and that, in order to make him liable for a *breach of the act of parliament, it was indispensable that [* 17] it should be shown that he shipped the goods on board the vessel, with a guilty knowledge of its object and destination: they contended, also, that no more than one penalty could be decreed under the act, for the same offence, there being no provision in the act for making the penalties cumulative.

The *Queen's Advocate* (Sir John Dodson) and the *Solicitor-General* (Sir Robert Monsey Rolfe) for the respondents, were stopped by the court.

LORD BROUGHAM. It appears to their lordships that the only question for their decision now, is respecting the penalties. Whether the court below was right in giving two penalties against Del Campo and Riera, or whether they ought not to have given a joint penalty against both. Now Del Campo and Riera receive goods on board; which Martinez and Sherwill ship: Martinez is the owner of the goods, but Del Campo is the owner of the vessel. The sentence of the court below forfeited the goods as well as the vessel. We are of opinion that, by the 7th section of 5 Geo. IV. c. 10, the goods are only forfeited when they are the goods of the owner, and that that part of the sentence, therefore, must be reversed. With respect to the other appellant, Del Campo, the owner of the vessel, the case is

different. There is no doubt, and it is admitted by the appellants' counsel, that this vessel was fitted and equipped for the purpose of the slave-trade. Being found in a British port, that alone subjects her to seizure; but the act of parliament has also attached penalties to the owners of vessels found equipped for, or engaged in such traffic.

Throughout all the clauses in which the penalties are named, [* 18] *the word "persons," is used, and it has been contended that these clauses can only apply to such "persons" as are British subjects, and that, consequently, Del Campo being a subject of the Queen of Spain, resident at Cadiz, without the jurisdiction of the Vice-Admiralty Court, cannot be made subject to its decree. But the offence is committed within the jurisdiction of that court, which acts *in rem* as well as *in personam*; and their lordships have no doubt that the court at Gibraltar had full jurisdiction to award the penalty against the owner, as well as to seize his vessel. The doubt their lordships have entertained, is respecting the decree of two penalties of 10,000*l.*; one against the owner, Del Campo, and the other against the master, Riera, for one and the same offence; namely, the receiving of goods on board.

The single offence of shipping or receiving goods on board is made a joint offence; the words are, "in every case the person so offending," not every person so offending; and though, as was observed by Lord Mansfield, in *Rex v. Clarke*, (Cowper, 610,) "where the offence is in its nature several, and every person concerned may be separately guilty, there each offender is separately liable to the penalties," it has been decided in *Hardyman v. Whitaker*, (Bull. N. P. 189,) that where the offence is made a joint offence by statute, the parties concerned are liable to but one forfeiture; this has been followed in *Barnard v. Gostling*, (2 East, 569.) Looking to the words of the act, and these authorities, their lordships are of opinion that the separate penalties of 10,000*l.* against Del Campo and Riera, must be remitted; and that instead, one penalty only of 10,000*l.* must be pronounced due from them jointly: that the goods of Pedro Martinez must be restored, or that he be at liberty to take such steps as he shall be advised

[* 19] *for recovering their value, the nature of which their lordships give no opinion upon; subject to these alterations, and to the remission of the sentence against Sherwill, which has already been pronounced, their lordships will recommend her Majesty to affirm this appeal, but without costs.

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ON APPEAL FROM THE VICE-ADMIRALTY COURT OF GIBRALTAR.

THE WINWICK.

Miles Barton and others, *Appellants*, and William Henry Sheriff and
Edited Nicholl, Esq., her Majesty's Procurator-General, *Respondents*.¹

February 7, 1840.

The Act 5 Geo. IV. c. 113, throws the burden of proof of the facts necessary to constitute a liability to forfeiture or penalties upon the prosecutor, and the privileges given by section forty-six to seizers, are not for their benefit, but for their protection against liability to costs and actions, where the judge shall certify pursuant to 4 Geo. III. c. 15, s. 46, that there was probable cause for seizure.

A vessel having been seized in the port of Gibraltar, on the allegation that she was engaged in carrying slaves, or persons to be dealt with as slaves, and upon proceedings taken against her, held forfeited, and the owners, master, and mate, condemned in penalties, the judgment of the Vice-Admiralty Court of Gibraltar was reversed, the judicial committee being of opinion that the evidence of the persons being slaves, or intended to be dealt with as slaves, was in itself doubtful, but that neither the owner, master, or mate, were proved to be cognizant or privy to that fact, which it was the duty of the seizers to make out.

Upon a monition from the judicial committee against the judge and registrar of the Vice-Admiralty Court of Gibraltar, to transmit the proceeds arising from the sale of a vessel decreed to be forfeited, and sold subsequent to an appeal being asserted, and an inhibition issued and served, the whole amount of the proceeds must be brought into court, and not the balance remaining after deducting the costs and fees incident to the seizure and sale. The refusal to comply with such monition is a contempt, and an attachment for such was granted by the judicial committee against the judge, registrar, and marshal of the Vice-Admiralty Court.

THIS was an appeal by the owners and officers of a vessel seized in the port of Gibraltar, and condemned, for having on board three persons, alleged to be * slaves, against the sentence of [* 20] condemnation, and the penalties imposed in consequence of such sentence.

On the 12th of October, 1837, the ship Winwick arrived and anchored in the port of Gibraltar, having sailed from Trieste on the 1st of September previous, and being bound for Bahia, in Brazil: having discharged part of her cargo and taken on board certain goods for the port of Bahia, and being about to sail, she was seized on the 21st, by

¹ Present: Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Honorable Stephen Lushington, D.C.L.

William Henry Sheriff, captain of the port, on the allegation that she was engaged, or employed, in the illegal carrying away or removing of slaves, or other persons, as or in order to their being dealt with as slaves, and having on board two male slaves called José and Candido, and one female slave called Laurianna.

In the muster-roll which was seized with the ship's papers, the above three persons were described as passengers, travelling with passports; which were subsequently found, and appeared to have been signed by the Austrian minister at Vienne, and *viséd* by the director of police, and British vice-consul at Trieste.

Separate deeds of manumission, both of José and Candido, were also found, with letters from their late master, Mr. John Natterer, formerly of Rio Janeiro, but then of Vienna, soliciting employment for them * at Bahia. One of these letters also contained a history of their previous employment.

On the 2d of November, the usual monition issued at the suit of her Majesty's advocate and procurator-general, and having been duly executed, a claim was given in on behalf of James Cocksholt, and Miles Barton, as the principal owners of the ship, and of Charles Cotesworth, Thomas Palgrave, Margaret Dowie, and Coote Heley Hutchinson, the other owners of the vessel.

The claim was supported by affidavits, denying that the parties in question were slaves, and repudiating all the circumstances which could fix the owners with the knowledge of the fact. A libel was given in on the 18th of December, 1837, on behalf of the crown, by the seizor, pleading the statute 5th Geo. IV. c. 113, and containing seven articles.

Various witnesses were examined on the libel, including the alleged slaves José and Candido, both of whom stated that they left Vienna contrary to their inclination, but because their late master would not allow them to remain; that they considered themselves slaves, inasmuch as neither of them had received their passports or letters of freedom. It did not, however, appear, that they had ever claimed, or had occasion for them on the voyage.

The appellants having given in an allegation, and examined witnesses, tendered evidence of the law of Brazil, of the 7th of November, 1831, declaring that "all the slaves that enter the territory or the ports of Brazil, coming from abroad, are free, except sailors on board any vessel belonging to countries where the slave-trade is permitted, so long as they are employed in the service of the same vessel, * or those who abscond from the territory, or from on board a foreign vessel; who are to be given up to the masters who may claim them, and sent out of Brazil."

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On the 20th July, 1838, the cause came on for hearing before Mr. Barron Field, the judge of the Vice-Admiralty Court at Gibraltar, when judgment was given for the respondents, and the ship, her tackle, and slaves, adjudged to be forfeited to the Queen. The following penalties were also pronounced for, namely: the sum of 300*l.*, being 100*l.* for each of the slaves to be due from William Hodge, the master of the ship, William Hodge, Jr., the first mate, and Miles Barton, Charles Cotesworth, James Cocksholt, Thomas Palgrave, Margaret Dowie, and Coote Hely Hutchinson, the owners thereof jointly, (all of whom were appellants in the present case,) and condemned them in costs.

On the 3d of August, 1838, the proctor for the owners and officers of the ship thus condemned, asserted an appeal from the above decree, and executed the usual bond: and on the 10th of the same month, the judge, at the petition of the procurator-general, and upon the marshal's report of the perishable state and condition of divers of the ship's stores, articles, and provisions, granted a decree of sale of the same, which was accordingly executed.

The appeal from the decree of the 20th of July was duly entered and prosecuted, and referred by her Majesty to the judicial committee of the privy council, by whom, on the 14th of December, 1838, an inhibition was issued, whereby the judge, the registrar, and Captain Sheriff, in special, and all others in general, were inhibited, that pending the appeal, they should *not do, or attempt [* 23] any thing to the prejudice of the appellants, or their cause of appeal.¹

¹ The following is a copy of the Inhibition, which varies only in the particulars of the case from the usual form.

VICTORIA, by the grace of God, &c., to all and singular our liege subjects being literate persons whomsoever and wheresoever in and throughout our said united kingdom, and other our foreign plantations and dominions, greeting: Whereas, &c., (here follows a recital of the various proceedings in the court below, the sentence, and appeal,) and whereas we have been pleased to refer the said appeal to the judicial committee of the privy council, and whereas the worshipful Augustus Gostling, Doctor of Laws, one of the surrogates of the said judicial committee lawfully appointed, hath decreed an inhibition and citation to the effect following (justice so requiring); we do, therefore, authorize and empower and strictly charge and command you jointly and severally that you do inhibit or cause to be inhibited the said Barron Field, Esq., the judge from whom the said cause is appealed, his surrogate, registrar, or actuary, and the said William Henry Sheriff, and also Iltd Nicholl, Esq., our procurator-general, in special, and all others in general, whom, by the tenor hereof we so inhibit, that neither they nor either of them, pending the said cause of appeal, do or attempt any thing to the prejudice of the said parties, appellant, or their said cause of appeal; but that they may have full liberty and power to proceed in and prosecute the same so long as it

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[* 24] * This inhibition was served personally on the judge and registrar on the 9th January, 1839.

On the 8th of February following, her Majesty's advocate-general moved, upon the affidavit of a ship-builder, resident at Gibraltar, stating that the vessel had deteriorated in value, and was likely to decrease, for the sale of the ship. The motion was opposed by the appellant's proctor, who insisted that the Vice-Admiralty Court had no power to order a sale after service of the inhibition, and pending the appeal; the judge, however, pronounced for the sale, and, accordingly, on the 14th of March, the ship was sold by the deputy-marshal of the Vice-Admiralty Court of Gibraltar for 7,050 dollars (1,591*l.*)

Against this order, the appellant's proctor asserted an appeal, which was admitted, and bail given, and allowed for its prosecution.

On the 21st of the same month, upon the application of the advocate-general at Gibraltar, the bill of costs on behalf of the crown was referred to the registrar for taxation, and an order was at the same time made for the payment thereof, with the judge's, registrar's and marshal's fees, amounting altogether to the sum of 965*l.* 10*s.* 10*d.*, out of the proceeds of the sale: this application was *ex parte*, no notice having been given to the appellants' proctor, nor was any copy of the bill of costs of the seizers of the vessel, or of the crown, delivered to him, pursuant to the thirty-first rule for regulating the practice of the Vice-Admiralty Court, or notice of any appointment for the taxation of such costs.

[* 25] * As soon as the sale was known in England, the usual monition was issued from the judicial committee against the judge and registrar of the Vice-Admiralty Court, to transmit the proceeds of the sale: this monition was served personally on the judge and registrar, on the 19th of April, 1839, but in consequence of

shall depend and remain undecided, under pain of the law and contempt thereof; and that you also cite or cause to be cited the said William Henry Sheriff, and Ilted Nicholl, Esq., to appear before the judicial committee of our privy council aforesaid, or any four of them, in the Privy Council Chamber, Whitehall, the thirtieth day after service of these presents, if it be a court day, otherwise before their lordships' surrogate in the Common Hall of Doctor's Commons, situate, &c., upon the next court held there between the usual hours for hearing causes, then and there to answer unto the said William Hodge, William Hodge, the younger, Miles Barton, Charles Cotesworth, James Cocksholt, Thomas Palgrave, Margaret Dowie, widow, and Charles Coote Hely Hutchinson, in the said cause of appeal; and, further, to do and receive as unto law and justice shall appertain, under pain of the law and contempt hereof; and whatsoever you shall do or cause to be done in the premises, that you duly certify the same to the said judicial committee, or any four or more of them, or their surrogate, together with their presents. Given at London under the seal which we use in this behalf, this 14th day of December, 1838, and of our reign the second.

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the payment of the costs, and officers' fees, the proceeds of the sale were reduced to the sum of 635*l.* 9*s.* 2*d.*, which sum was alone transmitted.

On the 13th of June, 1839, on the motion of Dr. Nicholl, the judicial committee granted a further monition against the judge, registrar, and deputy-marshal of the Vice-Admiralty Court, to transmit the above sum of 955*l.* 10*s.* 10*d.* so deducted, and detained as the amount of costs incurred on behalf of the crown, and the fees of the judge, registrar, and marshal, in proceeding to condemnation.

To this monition, the judge, registrar, and marshal, made a special return, setting forth a general statement of the above proceedings as affecting them, and stating that the monition to transmit the proceeds was not served until after the payment of the costs and fees: that the appellants not being within the jurisdiction of the Vice-Admiralty Court, and not being by the practice required to give security for costs, the costs of condemnation could not be recovered from them personally; that the proceedings in courts of admiralty are *in rem*, and the *res* when condemned, is liable to pay the costs of the suit in the first instance; that neither the judge, registrar, or marshal, had any salary attached to their respective offices, nor any other emolument therefrom than the fees allowed them by the 2 Will. IV. c. 51, and the order in council of the 23d of June, 1832.

That if the judge of the *court had committed any error, [* 26] such error proceeded purely from a mistake of the practice of the courts of admiralty, and not from any intention of disobeying the inhibition of the Superior Court: and that the registrar and deputy-marshal, merely acting in obedience to the orders of the court, could not be answerable in their persons or property for a judicial error; they prayed, therefore, the judicial committee to reserve the question till after the hearing of the appeal.

Upon this return, and an affidavit of the appellants' proctor at Gibraltar, Dr. Nicholl, on the 7th of December, 1839, moved for an attachment against the judge, registrar, and deputy-marshal of the Vice-Admiralty Court of Gibraltar, for non-compliance with the monition of the 13th of June, 1839. The motion, which was *ex parte*, was granted, the attachment being ordered not to issue for two months.¹

¹ The following is the order for attachment as entered in the registry of her Majesty's High Court of Admiralty and Appeals.

"On Saturday the seventh day of December in the year of our Lord, 1839, before the Judicial Committee of her Majesty's most honorable Privy Council, at the Council Chamber, Whitehall."

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On the 7th of February, 1840, the original appeal came
[* 27] * on for hearing, when the appellants relied on the following reasons :—

1. That the true conclusion to be drawn in the case, was that the three persons in question were not slaves, nor were they intended by any one to be dealt with as slaves.

2. That the adjudication of the penalties as against the owners was wrong and erroneous, inasmuch as they were utterly ignorant of the transaction from beginning to end ; and so, also, as against the captain and mate, inasmuch as the true conclusion to be drawn from the evidence was, that they were wholly innocent of the offences in respect of which the penalties were adjudged.

3. That as to the adjudication of the forfeiture of the ship, it was erroneous, and that there was no evidence of any offence being committed against the fourth section of the statute upon which the forfeiture was adjudged.

[* 28] * The respondents submitted that the sentence appealed from ought to be affirmed, and the cause remitted, for the following reason :—

Because the said vessel, The Winwick, being the property of the appellants, Miles Barton, Charles Cotesworth, James Cocksholt,

Present : &c.

"In pain of the worshipful Barron Field, Esq., the Judge ; James Ross Oxberry, Esq., the Registrar ; and Edward Pritchard, the Deputy-Marshal of the Vice-Admiralty Court of Gibraltar, not having complied with the tenor of the monition personally served on them respectively, to transmit the sum of 955*l.* 10*s.* 10*d.* into the registry of this court, the said sum being the balance of the net proceeds of the said ship or vessel Winwick, her tackle, apparel, or furniture, and the goods, wares, or merchandises laden therein, as mentioned in the said monition ; their lordships, at the petition of Gostling, on motion of council, decreed them to be attached for such their contumacy and contempt, but direct the attachment not to issue for two months from this day."

No attachment was issued pursuant to the above order, the parties having, within the time limited for its issuing, complied with the monition. This appears from the following entry in the same registry :—

25th January, 1840.

Barton and others *v.* The Queen, Sheriff, and others.

The Ship Winwick.

"Appeared personally, William Henry Sheriff, Esq., captain in her Majesty's royal navy, the seisor, and one of the respondents, and in obedience to the monition served upon Barron Field, Esq., the Judge, James Ross Oxberry, Esq., the Registrar, and Edward Pritchard, the Deputy-Marshal of the Vice-Admiralty Court of Gibraltar, brought in the sum of 955*l.* 10*s.* 10*d.*, the said sum being the balance of the proceeds of the said ship or vessel Winwick, her tackle, apparel, and furniture, and the goods, wares, and merchandise laden therein, as mentioned in the said monition."

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Thomas Palgrave, Margaret Dowie, and Coote Heley Hutchinson, respectively, British subjects, and under the charge or command of William Hodge, the elder, as master, and of William Hodge, the younger, as mate, was engaged or employed in the illegal shipping or receiving on board, or detaining, or confining, or carrying away, or removing of slaves or other persons, as, or in order to their being dealt with as slaves, contrary to the statute of 5 Geo. IV. c. 113.

Sir W. Follett, Q. C., Dr. Nicholl, and Mr. S. Martin, for the appellants,—contended that, under the Slave Abolition Act, a guilty knowledge that the persons on board are slaves, must be proved; that the owners, master, and mate, ought to have been presumed innocent, and not put by the judge of the Vice-Admiralty Court to the proof of that fact; that the former must be ignorant, and the condemnation of the ship, therefore, was illegal, and there was no sufficient proof of the knowledge of the latter to fix them with the penalties decreed. They contended, also, that even if the three individuals, José, Candido, and Laurianna, had, previously to their arrival in the Brazils, been slaves, they were not such at the period of the ship's seizure, either by the law of Brazil, or according to the principles laid down by Lord *Stowell, in the case of the slave Grace,¹ [* 29] and that therefore, the having them on board was not an offence, within the meaning of the statute. They insisted, also, that they were intitled to full restitution in value for the sale of ship and cargo after the service of inhibition from the judge, registrar, and deputy-marshal, and they prayed the court to award them damages and costs, as in the cases of *The Der Mohr*,² and the *Peacock*.³

The *Queen's Advocate*, (Sir John Dodson,) the *Attorney-General*, (Sir John Campbell,) and *Mr. Wigram, Q. C.*, for the respondents,—insisted, that the policy of the Slave Abolition Act was to throw the proof of innocence upon the parties, the owner and officers of vessels found engaged in the traffic prohibited by the statute; that the same principle prevailed in the excise laws, where forfeiture and penalties were incurred by the simple possession of the contraband goods; in the game laws, under which the having game in possession after a certain day, renders persons liable to penalties; that by 45 Geo. III. c. 89, s. 6, the possession of forged bank notes is evidence of guilt, and made a felony "without lawful excuse, the proof whereof shall lie upon the person accused;" and that the common case of a receiver of stolen goods, on whom the burden of proving his igno-

¹ 2 Hagg. Ad. Rep. 95. ² 3 Robinson, Ad. Rep. 129. ³ 4 Robinson, Ad. Rep. 185.

The Winwick. 2 Moore's P. C. Rep.

rance of the fact of their being stolen was always thrown, was precisely similar. They contended that the evidence was sufficient to show that these persons of color were considered and treated [* 30] as slaves by the * master and mate, and so considered themselves ; that the law of Brazil, as pleaded, was not correct ; that slavery prevailed in every part of that country ; and that never having in fact acquired their freedom, they did not come within the principle of the case of the slave Grace. They cited Hetsel's Com. Treatise, 4th vol., 64, 65.

July 3, 1840. MR. BARON PARKE. This case has stood over for some time, in order to give their lordships an opportunity of carefully considering the provisions of the Slave Prevention Act, 5 Geo. IV. c. 113, and examining the evidence adduced on both sides in the court below ; they have done so, and though they cannot say that the construction of the act is not open to some doubt, or that part of the evidence may not give rise to suspicion, they think that the sentence of the court below cannot be sustained, and will, therefore, advise her Majesty to reverse it.

Their lordships, however, think it right to say, that upon one of the questions which has been adverted to in the course of the argument, they have felt no doubt, and are satisfied, that the learned judge of the court below has labored under a misconception of the meaning of the act, in a particular by no means unimportant, if the statement with which we have been furnished correctly represents the grounds upon which his sentence proceeded ; whatever the construction to be put upon the statute may be, the burden of the proof of the facts necessary to constitute a liability to forfeiture or penalties unquestionably lies on the prosecutor, for it has certainly not been [* 31] thrown upon the claimant or defendant by * any special provision in this statute. The learned judge appears to have misapprehended the effect of the forty-fifth section of the act, which extends the benefit of the 4th Geo. III. c. 15, and any other acts which there may be containing provisions for the protection of seizers, it is not the provisions for their benefit, but for their protection, that are referred to ; and such is the example for liability to costs, and actions for seizures, if the judge should certify that there was reasonable cause for seizure. It is the forty-sixth section of the act of 4th Geo. III., not the forty-fifth, which is referred to in the section in question, and, consequently, it did not lie on the defendants to prove that the persons on board their ship were not slaves, or persons falling within the description in the act, nor to disprove their knowledge of that circumstance, if such knowledge be necessary to constitute the offence. The case must be proved by those who prosecute

on behalf of the crown, as in every case of penalty or forfeiture, by the ordinary evidence, by which such cases are made out; not that it must always be positive and conclusive evidence, for a *prima facie* case is sufficient where further proof could not reasonably be expected from the prosecutors, and the party accused omits to explain or repel it, where the means must be supposed to be in his power. But the seizer must establish his title by reasonable evidence, and the court ought not to pronounce for him, unless under, all the circumstances, it is judicially satisfied that the offence has been committed.

We do not think it necessary for the decision of the present case, to pronounce an opinion whether the three persons shipped at Trieste, or any of them, were or were not slaves, or "persons removed in order to *be dealt with as slaves," within the meaning of [* 32] the fourth and tenth sections of the 5th of Geo. IV. c. 113; upon the first of which sections the question of forfeiture, and on the second that of the penalty, depends. It may not be improper to state, that upon that point all their lordships who heard the argument are not altogether satisfied: but we think (though not without some doubt in a part of the court) that it is necessary, in order to create a liability to forfeiture or penalty, not merely to show the simple fact of persons answering the description of the act being found on board vessels; but also to prove that the owners, or the persons who have the conduct and management of the vessel claimed to be forfeited, or the persons sought to be affected by the penalty were, at least, cognizant of that fact. The forfeitures and penalties are not imposed in respect of the simple circumstance of slaves or intended slaves being on board, (as is the case in some of the revenue statutes in respect of prohibited goods,) but are both marked as punishments on actors, for acts done. The fourth section inflicts the forfeiture on those who seize or employ vessels in order to accomplish any of the objects hereinbefore declared to be unlawful, and the use of these terms necessarily implies the knowledge of these objects, and the intent to accomplish. The tenth section, imposing the penalty, is capable of a similar construction, which is so accordant to our notion of natural justice, that it ought to be adopted; and we think it is not a sufficient answer to say, that in other parts of the statute, that the legislature have expressly said, that the act must be "knowingly and wilfully done," especially as in some of the cases, their introduction was necessary, *as there were no accompanying expressions, [* 33] such as in order to effect the object meant, or equivalent expressions imputing knowledge.

The question, therefore, to be decided upon the evidence in the case is, whether it is made out to the judicial satisfaction of their

lordships who are to pronounce their opinion upon the matter of fact, that the owners, master or mate, on whom the penalties have been imposed by the court below, were cognizant of, and privy to the fact, of any of these three persons being slaves, or intended to be dealt with as such, (supposing that they were.) The duty of making out these facts lies upon the crown or the seizer enforcing its rights; as to the owners, there is a total absence of proof, not only of any criminal design, but of all knowledge, on their part, of the fact of any negroes being on board; as to the master and mate, there is some evidence that required consideration, and the question as to their knowledge, is not so free from doubt.

It is not to be expected that upon such a question, depending upon a considerable number of facts, those facts should strike all our minds precisely in the same form of view. Their lordships, therefore, do not propose to enter into a minute consideration of the evidence in detail: it is sufficient to say, that we think that the captain acted *bonâ fide*, and, on the whole, that we are not satisfied judicially, that he or the mate was privy to the fact, of the three persons, or any of them, being either slaves or intended to be dealt with as such.

We shall, therefore, advise her Majesty to reverse the sentence of the court below; but, as we are of opinion that there was probable cause of seizure, we shall so certify, and that no action is to [* 34] be brought * against the seizors; we reserve, however, to the appellant any right he may have against the court below and its officers, for the disobedience of the inhibition in this case.

The following order was made in conformity with the above judgment by the Queen in council, on the 13th of July, 1840.

"That the decree or sentence appealed from be reversed; the principal cause retained therein; that the claim of the said Marcus Hill Bland, given in the court below, be admitted; and the said ship or vessel Winwick, her tackle, apparel, and furniture, be restored to the claimant, for the use of the owners and proprietors thereof, or the proceeds thereof (transmitted to the registry of this court) paid to them, but without costs and damages against the said William Henry Sheriff, Esq., the seizer of the said ship or vessel. And their lordships having reported that there was probable cause of the seizure and prosecution of the said ship or vessel, that the said appellants, the owners thereof, be at full liberty to proceed as they may be advised, against any person or persons whom it may concern, for further compensation for any loss they may have sustained; or expenses that may have been incurred, by reason of the sale of the said ship or vessel under the authority of the court below, after service of the inhibition under seal of this court.

CASES

SELECTED FROM VOLUME III.

OF

MOORE'S PRIVY COUNCIL REPORTS.

[THE CASES SELECTED ARE THOSE IN ADMIRALTY.]

1839-41.



C A S E S
HEARD AND DETERMINED BY THE
J U D I C I A L C O M M I T T E E
AND THE
LORDS OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

* THE PRINCE OF SAXE COBOURG, Ladd. [* 1]

Manoel Joaquin Soares, *Appellant*, v. George Rahn and others,
Respondents.¹

December 18, 1838.

To justify the resort, by a master of a ship, to a bottomry bond, it is requisite, by maritime law, that the advances should be merely to enable the ship to refit, or to pay for the repair and despatch of the vessel for the completion of her voyage, and that the master should be unable to obtain such advances upon personal credit.

The jurisdiction of the Court of Admiralty, in cases of bottomry bond, is founded on the existence of necessity, arising from the want of personal credit.

The sale of a bottomry bond, pursuant to public advertisement, by auction, to the lowest bidder, in a foreign port, by the master of a ship, is not sufficient to discharge a purchaser of the bottomry bond from making reasonable inquiries that the master is, under the circumstances, justified in granting the bond.

A bottomry bond on the ship, freight, and cargo, sold at public auction, in a foreign port, by the master and part owner of the ship, there being an agent of the charterer and sole owner of the cargo willing to advance, on personal credit of the owner of the cargo, for the necessary repairs of the ship, under the circumstances pronounced against.

Semble. The master, though the original hypothecator of the ship, and a part owner, is not precluded, by the practice of the Court of Admiralty, from joining his co-owners in impugning the bond.

THIS was originally a cause of bottomry, promoted and brought in the High Court of Admiralty by the appellant, Manoel Joa-

¹ Present, Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, the Chief Judge of the Court of Bankruptcy, and the Right Honorable Dr. Lushington.

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[* 2] quin Soares, the London agent of * Messrs. Le Cesne, Guillot & Co., of Lisbon, merchants, the legal holder of a bottomry bond, on the ship Prince of Saxe Cobourg, her cargo, and freight, against George Rahn and John Ladd, the principal owners of the ship, and Nathan Mayer Rothschild, the charterer of the vessel and sole owner of the cargo.

The question arose upon the validity of a bond taken up at Lisbon, by Ladd, the master of the vessel; the charterer of the vessel and sole owner of the cargo having an authorized agent there, who it appeared had waited upon the master, and informed him personally, and also in writing, of his character of agent for the owner, and expressed himself ready and willing to advance any money necessary to repair the ship on the personal credit of the owner.

It did not, however, appear that the holders of the bond were aware of this fact at the time the bond was executed, of which they became the purchasers in the following manner.

In the month of June, 1836, (the ship being in the port of Lisbon, bound, with a cargo of quicksilver, from the port of Cadiz to London,) it was publicly advertised at Lisbon, that on Thursday, the 23d of that month, a sale by auction would take place at the Exchange of that city at the accustomed hour, to the lowest bidder, of a loan on bottomry of the sum of 2,000 milreis, more or

[* 3] less, which was required to * defray the expenses occasioned by the vessel having been forced to put into the port of Lisbon.

At this sale Messrs. Le Cesne, Guillot & Co. attended and became bidders, and, after the sale had proceeded in usual course, the bond was adjudged to them, as having offered to take it at six per cent. premium, the lowest rate bid.

The bond was duly executed for the sum of 642*l.* 5*s.*, with interest after the above rate, and the money paid to the master, whereupon the ship proceeded on her voyage, and arrived in due course in the port of London, when, payment being refused, a warrant was obtained to arrest the ship, and an action commenced upon the bond at the instance of the appellant.

The action was resisted and the bond impeached, on the ground that the funds necessary for the repairs of the ship might have been obtained, and were, in fact, tendered, by the agent of the owner of the cargo and charterer of the vessel, on the personal credit of the owner, and that there was no such case of "unprovided necessity" as justified the resort to a bond of hypothecation. Various circumstances also were pleaded and proof produced, showing the master's knowledge that such credit might be obtained; of steps taken by

him, by putting the vessel under consignment to one James, and allowing him to discharge the cargo, for which commission was charged; one moiety being charged by the master, and which, being contrary to the commercial usage of the owners' (Rothschild's) house, was refused, whereupon the master had hypothecated the ship, not merely for the amount of the supplies, but to cover such commission.

On the 12th of May, 1837, the Judge of the High Court of Admiralty, (Sir John Nicholl,) by an interlocutory *de- [*4] cree, pronounced against the force and validity of the bond.¹

From this sentence the holders of the bond appealed to her Majesty in council.

Sir William Follett, Q. C., and Dr. Addams, for the appellant. There is no question that the master of the ship, being a part owner, had a right to consign the vessel to whoever he liked, for the purpose of repairing; he was not bound to consign it to the agent of the owner of the cargo. But it is said that the master might have got the necessary advances for the repairs of the ship from the agent of the owner of the cargo, without resorting to a bottomry bond. Of this fact Messrs. Le Cesne, Guillot & Co., the holders of the bottomry bond, were entirely ignorant; they knew nothing of the correspondence between the master of the ship and the agent of the owner of the cargo, or of the willingness of the agent to advance the necessary amount for the repairs, at the personal credit of the owner of the cargo. The bond being publicly advertised, Le Cesne, Guillot & Co. go into the market at Lisbon, where sales of bottomry are common, and matters of frequent occurrence, and the bond is adjudged to them, as having offered to take it at the lowest rate. Such advance was perfectly legal by the usage of Lisbon; and the sale having been allowed to pass off without any warning of any illegality in the master's conduct, Messrs. Le Cesne, Guillot & Co. did not and could not suspect that any objection would possibly arise to the validity of the transaction. The *circumstance [*5] of the bond being advertised for public auction was sufficient to show that there was an unprovided necessity, the publicity of which was sufficient to dispense with inquiries on the part of the lenders, as to the actual existence of the ship, even if there was evidence that they made no inquiry.

¹ Reported, 3 Hagg. Adm. R. 387.

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Ladd, the master, by whom the hypothecation was made, and who is one of the part owners of the ship, now claims an interest, and joins with the owners of the cargo in their defence to the bond; such a defence is collusive, and contrary to justice. If the bond is not good against the ship and cargo to its whole extent, at any rate it is to the extent of the interest of the master, who, as part owner, had a right, so far as his interest in the ship is concerned, to pledge it by bottomry bond. *Abbott on Shipping*.¹ *The Nelson*.² The court can regulate the *quantum* and reduce the bond. *The Augusta*.³

The *Queen's Advocate* (Sir John Dodson) and *Dr. Harding*, for the respondents. The only question is, whether the ship was in such a state of unprovided necessity as to warrant the master resorting to a bottomry bond. To justify a master of a ship resorting to a bottomry bond there must be a double necessity: first, a necessity for repairs, or supplies; and then an absence of personal credit. *Heathorn v. Darling*.⁴ *The Rhadamanthe*.⁵ *The Alexander*.⁶ A bottomry bond can be validly given only where the funds

[* 6] necessary cannot be raised on *personal security. In the present case, the necessary funds might have been procured on personal credit, the charterer of the ship and sole owner of the cargo having an authorized agent at Lisbon, who offered to advance all the necessary funds on the personal credit of the owner. We admit that the owner or part owner, to the extent of his respective interest, may hypothecate the ship; but that is not a bottomry bond. A Court of Admiralty has no jurisdiction over it; for there must be maritime risk to give a maritime court jurisdiction to entertain the suit.

Sir William Follett, in reply, referred to *Johnson v. Shipper*,⁷ *Abbott on Shipping*,⁸ and to *Heathorn v. Darling*.⁹

May 10, 1839. THE RIGHT HON. DR. LUSHINGTON This is an appeal from the High Court of Admiralty, which by its decree, bearing date the 12th of May, 1837, pronounced against the validity of a bottomry bond, the subject of this suit.

There is no material difference between the parties as to the facts of the case. They lie in a very narrow compass.

¹ Edit. by Shee, 130.

⁴ 1 Moore's P. C. Cases, 5.

⁷ 2 Ld. Raym. 892.

² 1 Hagg. Adm. R. 176.

⁵ 1 Dodson, 201.

⁸ Edit. by Shee, 129.

³ 1 Dodson, 283.

⁶ 1 Dodson, 278.

⁹ 1 Moore's P. C. Cases, 5.

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In the month of May, 1836, the vessel being hired by the house of Messrs. Rothschild, of London, with a cargo of quicksilver, left the port of Cadiz, on a voyage to London; in consequence of having sprung a leak she made for Lisbon, and arrived at Belem, which is about four miles below that port, on the 31st * of [*7] May, or the 1st of June. Ladd, the master, who was a part owner, was informed by a clerk of Finnie & Co. that their house were the agents and correspondents of Messrs. Rothschild; that they were prepared to take charge of the vessel, to make preparations for the repairs, and also to make every necessary advance. To this communication the master replied that he was already in the hands of the agent of Messrs. Rothschild; and it appears that a Mr. James had, by himself or clerk, already made some application to the master, to consign the vessel to him. On further explanation with the house of Messrs. Finnie & Co., the vessel was placed under their charge, and 600 packages, part of the cargo, unladen. At this time the master took the vessel from Messrs. Finnie & Co., and consigned it to Mr. Henry James; and it is alleged that his reason for doing so was, that Messrs. Finnie & Co. refused to charge any commission, being accustomed not to do so with respect to vessels freighted by Messrs. Rothschild; at the same time, however, Messrs. Finnie & Co. declared their willingness to make every necessary advance, and to pay all the expenses requisite for setting forth the ship to sea.

Repairs to a small amount were then done, and the cargo was reladen. In the account there appears a charge for commission on the cargo, amounting to 366*l.* 13*s.* 5*d.*, the shipwright's bill being 59*l.* 18*s.* 1*d.*

In the latter end of June, a correspondence took place between Ladd, the master, and Messrs. Finnie & Co., whether they would advance, on account of Messrs. Rothschild, the amount required to defray the expense of repairs, and other customary and usual charges incurred; to which Messrs. Finnie & Co. replied, that, upon examination of the accounts, they were *willing to pay [*8] such expenses and charges as would have been made, had the business remained in their hands. In these letters the master had declared that he must grant a bottomry bond on the ship and cargo. The result, then, is, that Messrs. Finnie & Co. declined to advance money to cover the commission, conceiving the same to be unnecessary, though they were willing to advance for all other necessary expenses.

The master then advertised for a loan on bottomry, by public auction. The lowest bidders were Messrs. Le Cesne, Guillot & Co.,

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who purchased the bond at six per cent. premium, and the master granted to them a bottomry bond on ship, cargo, and freight, at that rate of maritime interest, the amount for which the bond was granted being 642*l.* 5*s.* 0*d.*

In the act on petition it is alleged, on behalf of Messrs. Le Cesne, Guillot & Co., that they neither knew, nor had any reason to believe, that the owner of the ship or cargo had any authorized agent or correspondent in Lisbon, or that the master had any instructions to apply to Messrs. Finnie & Co. in case of need, or that he was furnished with any letter of credit to them, or any introduction whatever to their house of trade.

In considering the law applicable to this state of facts, it may be expedient to advert to the principles on which the validity of bottomry bonds have always been made to rest in the Court of Admiralty. In the large majority of cases, the master is neither owner nor part owner of the ship or cargo; when he takes up money on bottomry, he pledges the property of others, and that, too, upon maritime interest, which frequently is extremely high, and very onerous to the owners. To justify him in such an act, and to [*9] warrant the foreign merchant *advancing his money on valid security, it is requisite, by the maritime law, that the advances shall be merely to enable the ship to refit, or to pay for the repairs and despatch of the vessel for the completion of her voyage, and that the master shall be unable to obtain the same on personal credit.

This rule has always been rigidly maintained, and with no other qualification than that which justice and the interests of commerce necessarily call for. If the foreign merchant, after due inquiry, shall have reasonable ground for concluding that the repairs are necessary, and that the money cannot be raised on personal credit, then his security on the ship and cargo shall not be impeached or invalidated, because it might happen that, notwithstanding his reasonable and *bonâ fide* inquiries, the repairs were not necessary or the money might have been had on personal credit.

In the present case, their lordships are satisfied that all the advances necessary to be made, to enable the ship to complete her voyage, might have been had on personal credit; and, on the part of the bottomry bond holders, it is not alleged that any inquiry was made, as to any of the facts or circumstances relating to the ship. The validity of the bond, it is said, must be upheld, because the bond was bought at public auction by Messrs. Le Cesne, Guillot & Co., after public advertisement. It is contended that these circumstances are sufficient to render all inquiry, on the part of the lenders on bot-

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tomry, unnecessary ; but their lordships cannot assent to this doctrine, which, if admitted, might be attended with consequences very pernicious to the mercantile marine of this kingdom.

* In the first place it may be observed, that advertise- [*10] ments, and the sale of bottomry bonds, have not for their direct object the publicity of any of the transactions attending the ship, or the credit of the master. The principal object in view, by such proceeding, is, to produce a bond at the lowest rate of interest, by inducing public competition. Analogous to this is the common practice of sending circulars to different houses of trade, inquiring if they are willing to advance money on bottomry, and at what rate, for the voyage in question. But we are clearly of opinion that neither precedent nor principle, nor the consideration of the real advantage of commerce, would sanction us in considering those circumstances as sufficient to dispense with all inquiry on the part of the lenders.

The foreign merchant ought to know, that the master's authority to bind the ship and cargo by a bottomry bond is founded on necessity alone ; and that it is his duty, before he takes a security so oneously affecting the property of others, to satisfy himself, by a reasonable inquiry, that the circumstances of the case justify the master in this exercise of his authority. No such inquiry having taken place in this case, we think that the judgment of the court below was right, and that the appeal must be dismissed.

In the course of the argument it has been said, that the master, Ladd, being a part owner of this vessel, could not be heard, so far as applied to his own interest, to set up the defence which might be good for his coowners ; but however that might be before another tribunal, such argument cannot avail before the Court of Admiralty, because the authority * of that court, in the case [*11-] of bottomry bond, is founded upon the existence of, and necessity arising from, the want of personal credit ; and unless that fact be established, or, at least, after due inquiry, the credible appearance of such necessity, the Court of Admiralty has no jurisdiction to enforce the bond. It is not, in the received meaning of the term, bottomry bond at all, and of other bonds the Court of Admiralty takes no cognizance.

The Hersey 3 Moore's P. C. Rep.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

[*79]

* THE HERSEY, Grimwood.

John Gore and others, *Appellants*; and James Gardiner and Alexander Urquhart, *Respondents*.¹

February 6, 1840.

Bottomry bond given by the master upon a threat of arrest, for supplies previously furnished on his personal credit, held void.

THIS was originally a cause of bottomry, civil and maritime, promoted by the appellants, as the attorneys of Thomas Hewitt, against the ship Hersey, her tackle, &c., whereof Joseph Grimwood was master, and also against the freight due for transportation of the cargo on board the same.

[*80] * The circumstances of the case were as follows : —

The brig Hersey, being a new-built vessel, sailed on her first voyage from the port of Leith in the month of March, 1834, on a general trading voyage, under the command of Joseph Grimwood. In the month of April, 1835, she arrived at Hobart Town, from the Cape of Good Hope, where the master employed William Morgan Orr, a merchant of that town, with whom he was previously acquainted, as his agent or broker, for the purpose of receiving the freight of part of the cargo there landed, and disposing of the other parts. The ship afterwards left Hobart Town for Sydney, and returned in August, 1835, when the master again employed Orr, as agent or broker. Having taken in a cargo of oil and other goods, as freight, with passengers for London, the vessel was, as it appeared from the affidavits in the cause, ready to sail on the 27th of October following.

No accounts had been delivered by Orr to the master up to this time, though the sum of 28*l.* 15*s.* 7*d.*, the balance, as it afterwards appeared, on the account current between them, was paid by Orr to the master. The vessel was detained by reason, as it was alleged, of Orr's neglect to furnish his accounts. These accounts were deli-

¹ Present, Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

vered on the 3d of November, when, notwithstanding the above balance in favor of the master, a list or schedule of debts owing by him was produced, amounting in the whole to 45*l.* 11*s.* 11*d.*, and said to be for supplies and necessaries for the brig. Among these was an item for 83*l.* 2*s.* 10*d.*, for sundries furnished by Orr; 46*l.* 2*s.* 10*d.* and 16*l.* 6*s.* 6*d.*, sundries furnished by G. & A. Sutherland; 4*l.* 15*s.* ditto, by George Watson; and 8*l.* 2*s.* 3*d.*, for government, pilotage, and harbor dues.

* To provide for the payment of this balance, the master, [* 81] under the threat of arrest by Orr, hypothecated the ship, and executed a bottomry bond on the day following to Thomas Hewitt, merchant, resident in Hobart Town, for the sum of 564*l.* principal, together with premium, to become due within six days after the arrival of the vessel in England.

The owners having refused to discharge the bond, on the ground that it was not given for necessary disbursements, and obtained by collusion between Orr and Hewitt, proceedings were commenced in the High Court of Admiralty to recover the amount.

On the 27th of November, 1837, the judge pronounced against the validity of the bond, on the ground that the credit given to the master was a personal credit, and did not constitute a lien on the vessel, and that there was an absence of all necessity for the hypothecation.¹

• From this judgment the appellant appealed, insisting on the following reason:—

I. That the bond was proved to have been given for necessary disbursements on account of the ship, in a port where the owners had no personal credit, and that there was no proof whatever of the fraud or other misconduct imputed to the obligee of the bond, in order to impeach its validity.

The respondents, however, relied upon the judgment of the court below, for the following reasons:—

I. That, at the time the bond was entered into, The Hersey was not in a state of unprovided necessity; that Orr, for whose benefit it was entered into, was at such time, and had for some time previously, * been the agent for the owners in respect [* 82] of the said ship; that he had in his hands sufficient funds belonging to the owners, and that money, if required, might have been obtained on account of the homeward freight, or on the personal credit of the owners.

¹ Reported 3 Hagg. Adm. R. 404.

The Hersey. 3 Moore's P. C. Rep.

II. That the bond was not contemplated, still less conditioned for, previous to the payment by Orr of the great mass of the sums for which it purported to have been given, and that all payments on account of the ship were made out of moneys belonging to the owners, previously in the hands of Orr.

III. That the bond was not entered into *bonâ fide* for the benefit of Hewitt, to whom it purported to have been given, but was obtained by duress on the master, in liquidation of a debt due to Orr, for goods supplied and moneys advanced to the master, on his own private account and personal credit.

Sir Frederick Pollock, Q. C., and Dr. Addams, for the appellants, cited *The Augusta*.¹

Sir William Follett, Q. C., and Dr. Nicholl, for the respondents were not called upon.

MR. BARON PARKE. This is as hopeless a case as was ever presented to a Court of Appeal. From the accounts, it is clear that the supplies were furnished on the personal credit of the master. There is too great a proneness, on the part of masters of vessels, to resort to bottomry bonds. It is only for necessary supplies or repairs that resort to a bottomry bond can be upheld; but even then it [* 83] * must be such a necessity as requires the hypothecation, namely, no personal credit being to be obtained. Here the supplies, in the first place, are not necessary supplies. There are several items in the accounts which are clearly not for necessary supplies or repairs. Then, at the time the goods are supplied, no agreement is made that their amount shall be secured by hypothecation; that is essential. But the day after the accounts are delivered, the master, as he alleges, upon a threat of arrest, and without any previous agreement or existing necessity, executes a bottomry bond. Now, although he might have been arrested, yet the ship could not have been detained; there is no pretence that there was any attempt or threat to arrest the vessel. Here both Orr and Hewitt must have known, or at least they must be taken to have known, that there was no necessity to hypothecate the ship, and they must take the consequence of their own act. All their lordships are of opinion that there never was a clearer case. Judgment affirmed, with costs.

¹ 1 Dodson, 283.

CASES

SELECTED FROM VOLUME IV.

OF

MOORE'S PRIVY COUNCIL REPORTS.

[THE CASES SELECTED ARE THOSE IN ADMIRALTY.]

1841-45.

CASES
HEARD AND DETERMINED BY THE
JUDICIAL COMMITTEE
AND THE
LORDS OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY
IN ENGLAND.

THE DIANA.

James Stuart, *Appellant*, and Richard Isemonger, *Respondent*.¹

February 11, 1842.

The 6th Geo. IV. c. 125, s. 55, does not exempt the owners and masters of vessels having a licensed pilot on board, from liability in respect of damages done by their vessel, unless the damage was solely caused by the neglect, default, incompetency, or incapacity of the pilot.

Where, therefore, it was proved that the accident happened through the carelessness of the master and crew, as well as the pilot, in not keeping a good look-out; the judicial committee of the privy council held, affirming the sentence of the Admiralty Court, that the civil liability of the owner in respect of damages continued.

THIS was originally a cause of damage, civil and maritime, promoted in the High Court of Admiralty of England, by Richard Isemonger, the respondent, the sole owner of the schooner Littlehampton, against James Stuart, the appellant, the owner of the ship Diana, arising from the collision of The Diana, when on her voyage from Barbadoes to London, with a cargo of sugar, having Richard Russell,

¹ Present: Lord Wynford, Lord Brougham, Lord Campbell, and Mr. Justice Erskine.

The Diana. 4 Moore's P. C. Rep.

a duly licensed cinque port pilot, on board, with The Little-
[* 12] hampton, when on * her voyage from Sunderland to Wor-
thing, with a cargo of coals. The collision occurred in that
part of the channel called the Gull Stream, between Ramsgate and
Broadstairs, on the morning of the 5th of September, 1838, whereby
The Littlehampton sustained so much damage that she shortly after
sunk.

The act on petition alleged that the accident was wholly occa-
sioned by the fault of The Diana, in not altering her course, and in
not keeping a good look-out. In reply to the act, it was denied by
the owners of The Diana, that no good look-out was kept on board
their vessel, and insisted that the damage was occasioned by The
Littlehampton; and that, even if the accident had been caused by
the neglect or incapacity of any one on board The Diana, that the
same was and could only be attributable to the pilot, inasmuch as
The Diana, at the time, was in the sole charge of a duly licensed
pilot, and that all his orders were duly obeyed by the man at the
helm and the rest of the crew; that the said pilot, having been taken
on board under the provisions of the act 6 Geo. IV. c. 125, by reason
of the premises, the owners of The Diana were not answerable for
the damages.

The judge of the Admiralty Court, (the Right Honorable Dr. Lush-
ington,) assisted by two Trinity Masters, by his sentence,¹ bearing
date the 12th of February, 1840, decreed for the claim of the respond-
ent, on the grounds that the accident was solely occasioned by the
fault of the persons on board The Diana, and that, as the accident
was occasioned by the joint misconduct of the pilot and crew, that
the liability still attaches to the owner of The Diana.

From this sentence the present appeal was brought.

[* 13] * *Dr. Addams* and *Mr. Cleasby*, for the appellants. There
is no dispute that The Diana was in charge of a duly licensed
pilot, and if any damage was done to The Littlehampton by the col-
lision, the presumption is, that the pilot, who is intrusted with the
navigation of the vessel, was to blame, and the *onus* of exemption
lies on him. By the 6th Geo. IV., c. 125, s. 55, it is enacted, "that
no owner or master of any ship or vessel shall be answerable for any
loss or damage which shall happen to any person or persons whom-
soever, from or by reason or means of any neglect, default, incompe-
tency, or incapacity of any licensed pilot acting in the charge of any

¹ Reported 1 W. Robinson's Admiralty Reports, 131.

such ship or vessel, under or in pursuance of any of the provisions of this act, when and so long as such pilot shall be duly qualified to have the charge of such ship or vessel." Having a pilot on board, in conformity with the requisites of this section, exonerates the owner of the ship placed under his control from being answerable for damage done by the collision. *Bennet v. Moita*; ¹ *Ritchie v. Bowsfield*; ² *The Christiana*.³ It may be inferred, that where the master is bound to place his ship in the charge of a pilot, and does so accordingly, the ship is not to be considered as under the management of the owners or their servants. *Caruthers v. Sydebotham*; ⁴ *Abbott on Shipping*, p. 184.⁵ The judgment of the court below condemned the owner of *The Diana*, by reason of the alleged negligence of the master and crew in not keeping a good look-out at the time of the accident, imputing blame to the pilot, and the master *and [* 14] crew. If blame is to be attributed to the master and crew as well as the pilot, the fifty-fifth clause is virtually repealed. The blame, if any, should be imputable to the pilot alone, who had the control of the vessel. There is no evidence to show that there was negligence on the part of the master and crew, or that the crew did not obey the pilot. If the owners are to be fixed with the responsibility while the pilot is in charge of the vessel, the party complaining must show that the blame was not attributable to the pilot but to the master and crew.

The *Queen's Advocate*, (Sir John Dodson,) for the respondent. Two questions are raised by the appellant, one of fact and the other of law; first, to whom the blame attaches; and, secondly, whether by law, the owner of *The Diana* is exonerated from damages. Upon the first point, the evidence leaves no doubt that *The Diana* was the sole cause of the collision, occasioned by the want of proper care of the persons on board. There was a want of a good look-out, which was clearly the duty of the master and crew, and through their negligence the accident took place. But it is said by the owner of *The Diana*, that, although the accident might have been caused by *The Diana*, still that he was not responsible, as he had a licensed pilot on board, pursuant to the 55th section of the 6th Geo. IV. c. 125, and *Bennet v. Moita*, and *Ritchie v. Bowsfield*, are cited in support of such position. These cases are distinguishable, and do not apply to the peculiar circumstances of this case. Here, there is the joint

¹ 7 Taunt. 258.² 7 Taunt. 309.³ 2 Hagg. Adm. Rep. 183.⁴ 4 Maul. & Sel. 77.⁵ 6 Ed. by Shee.

The Diana. 4 Moore's P. C. Rep.

misconduct of the pilot and of the master and crew, which [* 15] the fifty-fifth section does not provide for. *The *onus* of exemption is, therefore, thrown on the owner. The objection raised, that the liability by the sentence of the court below falls upon the owner alone, and not upon the pilot, who was in part to blame, can have no weight. Sir John Nicholl, in *The Girolama*,¹ held, acting upon the authority of *The Neptune the Second*,² that the Act 6th Geo. IV. c. 125, only exonerates masters and owners from personal responsibilities, leaving the remedy *in rem*. unimpaired.

February 19th. LORD BROUGHAM. This was an appeal from a decree of the Court of Admiralty, condemning the appellant, as the sole owner of *The Diana*, to make good to the respondent the damage sustained by his ship, *The Littlehampton*. That damage arose from the collision of the two vessels, when *The Diana* had a licensed pilot on board.

The learned judge in the court below was assisted by Trinity Masters, who gave it as their clear opinion that the collision was not occasioned by any fault or neglect on the part of the people belonging to *The Littlehampton*, thus negating one ground of defence taken by the appellant. In this opinion upon the facts the learned judge concurred, and their lordships see no reason to form a different conclusion from the evidence in the cause.

The Trinity Masters, also, with the concurrence of the learned judge, were further decidedly of opinion that the accident was attributable to neglect and deficiency of look-out and management on board *The Diana*, but that the blame was to be shared by the master and crew, with the pilot. They considered that the acci-

[* 16] dent * was attributable to the pilot's not sufficiently performing his duty, but they also decidedly thought that there was neglect on the part of the master and crew. Although the evidence on this subject may not be so clear as that which absolves *The Littlehampton*, yet their lordships can see no good ground for coming to a conclusion different from that to which the Trinity Masters and the court below were led; and they consider it as sufficiently proved that the master and crew were in part to blame for the neglect which caused the accident.

An argument was raised, both here and in the court below, that the vessel doing the damage being *prima facie* answerable for it, the proof lies on her owners, of whatever is necessary to bring themselves

¹ 3 Hagg. Adm. Rep. 169.

² 1 Dod. 467.

within the description to which the exception in the pilot act refers, If this position were admitted, then, upon the construction of the act which the court below has adopted, and which we are about to consider, it would be incumbent upon the appellant to prove that the accident was solely owing to the pilot's neglect, and that the master and crew had no share of the blame. But there is no occasion to discuss that question in this case, or to inquire how far it is decided in one way by the case of *Bennet v. Moita*, 7 Taunt. 258; for, upon which side soever the proof lies, there is no evidence here to show that the pilot was not alone to blame, the master and the crew being also justly chargeable with neglect. The question, therefore, which arises, and the only question, is, whether or not, the owner of The Diana is discharged from his responsibility for a damage in part occasioned by his servants, the master and crew navigating, but negligently navigating, his vessel, because of that vessel having, at the *time, been in charge of a licensed pilot, to whose [* 17] neglect in other part the accident was owing? And the answer to this question must depend upon the construction of the statute 6 Geo. IV. c. 125, sometimes called the General Pilot Act. The fifty-fifth section of that act provides, that "no owner or master shall be answerable for any damage which shall happen from, or by reason or means of, any neglect, default, incompetence, or incapacity of any licensed pilot duly acting in charge of any vessel under the provisions of the act." Does this provision intend to exempt from all liability, provided there be a pilot on board? Of course it is not contended that such exemption would extend to cases in which damage was done by the crew disobeying the pilot's orders, though he, too, might be chargeable with neglect of duty. But it is contended, that although the crew be in part to blame, yet, if in any part, the pilot be also blamable, the exemption attaches. Now this appears to us a construction contrary to the plain meaning of the words, and inconsistent with all the principles which can be applicable to such a question.

The words are, "damage which shall happen from, or by reason of, or means of, any neglect" of the pilot. He is the cause and author of the damage, from all consequences of which the owners are relieved, upon the ground that they had no choice in his appointment, but were compelled to employ his services. By the common law they are answerable for the damage done by their vessel, because it is navigated to their profit, and by their servants. The statute interposes, and takes the management, in a great degree, out of their hands; it, therefore, indemnifies them from any damage which the person imposed upon them may *occasion; but it surely, cannot [* 18]

The Diana. 4 Moore's P. C. Rep.

intend to indemnify them for what is, in part, occasioned by their own servants. If it be said that they should be answerable only for the portion of the damage occasioned by their servants, and not for that portion occasioned by the pilot, the answer is plain,—no such apportionment of damage is provided for by the statute; and, in all probability, because it would hardly be possible to do so; but the legislature has done enough to relieve the owners, by exempting them, where the pilot, whom they were forced to employ, has done the mischief, and leaving them answerable where their crew, whom they had selected for this service, are sharers in the blame. Let it be observed, too, that the exemption is given, not only to the owners, but to the master. If the owners were on board, and so far interfered, as in part to cause the mischief, it could hardly be contended that the statute would work an indemnity to them, against the consequences of their own negligence. But the master would be exempted from the consequences of his own negligence, if the construction were to prevail, which makes the conduct of the master and crew immaterial, provided the pilot be at all in fault.

The construction which has been adopted below, appears to have proceeded, by reference to the corresponding section in the act, which first gave this exemption, the 52d Geo. III. c. 39, s. 30. The words there are, that no owner or master shall be answerable for any loss or damage, for or by reason or means of any neglect, &c., of any pilot taken on board in pursuance of this act. These words appear plainly to provide, and only to provide, that the owner or master shall not be answerable for the acts, or rather the defaults, of the pilot.

The 53d section of the latter act, 6 Geo. IV. c. 125, ap-
[* 19] pears * further to favor the same construction. It exempts from all consequences of having no pilot on board, provided it can be shown that all means were used to obtain a pilot. But surely, as was said by Sir John Nicholl, in *The Girolamo*, (3 Hagg. Adm. Rep. 169,) this provision never can be intended to exempt from all responsibility for whatever might be done, or whatever may happen, so it may only have chanced that a pilot could not be got; it only exempts from whatever was occasioned solely by the want of a pilot,—and by no other cause.

It must be manifest, upon every view which can be taken of the principles applicable to this question, that the civil responsibility of the owners for the damage done in navigating their vessel, like that of all persons employing servants for their own benefit, can be restricted only in so far as their own acts, or, which is the same thing, the acts of their servants, are not the cause of the damage done. To find similar cases would not be easy, because there are hardly any in

The Diana. 4 Moore's P. C. Rep.

which persons could be made answerable for the acts of others whom they are forced to employ, and where alone it would be necessary to exempt or indemnify them. The contract of insurance affords, perhaps, some analogy in that very anomalous risk undertaken by the insurers indemnifying the owner against the misconduct, even the criminal misconduct, of his servant, the master. But here the assured cannot recover if the owner at all consented to the barratry, and the indemnities have been absorbed when any negligence of the owners enabled the mariners to do the act. *Pipon v. Cope*, (1 Camp. 434.) Another analogy is furnished by the restriction of the liability of carriers; but let us take *statutes relative to the liability of ship-owners, of which the earliest is 7 Geo. II. c. 15, and the latest the 53 Geo. III. c. 159, which confines their liability for damage done, to the value of the ship and freight. It is to be observed, that this exemption is confined to cases of damage arising "without the fault or privity" of the owner; and the courts have held, that a strict construction should be given to a statute limiting the common-law responsibility of all persons for injuries occasioned by their acts, or the acts of those in their service; so that the court of B. R. in the case of *Gale v. Laurie*, (5 B. & C. 156,) held fishing-stores to come within the term appurtenances of a ship, used in the acts, and it is held for the purpose of enlarging the remedy of the party damnified, and thus restraining the exemption, although in a policy upon the ship it was agreed that their stores would not be considered as covered.

It is to be observed, that in the case of *The Girolamo*, (3 Hagg. Adm. Rep. 169,) though the Court of Admiralty avoided deciding the present question on the ground that its decision was not necessary to dispose of the case, yet the whole remarks of the learned judge (Sir John Nicholl) very plainly indicate that his opinion strongly inclined towards the construction which their lordships have now adopted. But their lordships rely the less upon this circumstance, because Sir John Nicholl appears to have considered the decision of Lord Stowell, in *Neptune the Second*, (1 Dodson, 467,) as a decision upon the point, assuming that learned judge to have been aware of the act, (52 Geo. III. c. 39,) which there is every reason to believe he was not; for it certainly never can be maintained that this act, or *the one under consideration, is confined in its application to remedies at law; and that they do not govern the [* 21] proceedings *in rem* in the Court of Admiralty.

The order of their lordships, therefore, is, that the appeal be dismissed, the sentence of the court below affirmed, and the cause remitted.

The Prince George. 4 Moore's P. C. Rep.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

THE PRINCE GEORGE.

Junius Smith, *Appellant*, and Nathaniel Gould and others *Respondents*.¹

February 11 and 19, 1842.

A bottomry bond may be good in part, though void for the residue.

Where, therefore, a bottomry bond was given by the master at New York, as well for advances to obtain his discharge from arrest, at the instance of the consignees, on account of damage done on the voyage to part of the cargo; as for payment of the port duties and other disbursements necessary to enable the ship to prosecute her voyage; the judicial committee, reversing so much of the decision of the Admiralty Court as rejected the bond *in toto*, sustained the bond to the extent of the sums advanced for necessary supplies and payment of the port duties.

If reliance is placed upon a difference between the law of England and a foreign State, the party relying upon the difference is bound by witnesses or authorities to prove such fact.

THIS was an appeal from a sentence of the judge of the High Court of Admiralty in a cause of bottomry, brought by the appellant, the legal holder, (as assignee of Messrs. Wardsworth & Smith, of New York, merchants,) of a bottomry bond, dated 14th September, 1836, for 294*l.* 10*s.*, on the ship Prince * George, and the freight to be earned on a voyage then intended to be made by her; against the said ship, her tackle, &c.; and against Nathaniel Gould and James Dowie, of London, merchants, and Peter McGill and William Price, of Quebec, merchants, intervening in the cause, as the present owners of the ship.

In the month of September, 1836, the ship Prince George arrived at New York from London with a general cargo, and a large number of passengers, under a charter-party to the appellant, being destined from thence to Quebec, under a charter-party to the respondent, Gould, and others. By the charter-party to the appellant, a moiety of the freight (the entire sum being 506*l.*) was payable in London, previous to the sailing of the ship, and the remainder in New York, on the right delivery of the cargo there. During the voyage, the master broke bulk, and made use of some porter, part of the cargo on

¹ Present: Lord Wynford, Lord Brougham, Lord Campbell, and Mr. Justice Erskine.

freight, a portion of which he used as ship's stores for the crew, and the remainder he sold to some of the steerage passengers. On landing the cargo at New York, part of it was found to have been damaged by bad stowage. The consignees of the porter claimed five hundred and eighty-eight dollars, as the value of the deficiency thereof, and the owners of the damaged cargo claimed one thousand one hundred and fifteen dollars, as the amount of the damage. The only fund the master had to meet these claims and the port charges, and the expenses of furnishing the ship with provisions, and fitting her for sea on her further voyage under the second charter-party, was the moiety of the freight, amounting to 253*l.*, payable at New York under the first charter-party, which the consignees refused to pay, and the master, not being able to satisfy their claims for the deficiencies in, or damage done to the cargo, was arrested at their instance.

To relieve *himself from this arrest, the master applied to [* 23] Messrs. Wadsworth & Smith, the correspondents and agents of the appellant at New York, to advance such sums as might be necessary to meet his exigencies, and as neither he nor the owner of the ship had any personal credit in that city, they advised him to raise funds, which they ultimately agreed to furnish on bottomry. No money actually passed through the hands of the master, but Messrs. Wadsworth & Smith made up their accounts, and debited the money received by them for freight, with the claims for damage done to the cargo, and paid the charges and expenses of the ship at New York, necessary to enable her to proceed on her destination, and for repayment of such advances, with a maritime interest of 20 per cent., the master executed the bond now sued for. Messrs. Wadsworth & Smith also drew a bill of exchange for the amount advanced on the owner of the ship, payable at one day's sight after her arrival in London, in the event of which the bond was to be considered as satisfied. The bill of exchange having been presented and refused payment, the present suit was instituted, and the learned judge, (the right honorable Dr. Lushington,) by his decree, bearing date the 2d of March, 1838, pronounced against the force and validity of the bond. From this sentence the present appeal was brought.

The *Queen's Advocate*, (Sir John Dodson,) and *Mr. Toller*, for the appellant, contended, that the bond was, in the circumstances, good and valid, the money being advanced for the necessities of the ship in a foreign port, where the master and owners were without personal credit; that the fact of part of the money advanced on the bond, *being for the payment to the consignee for damage [* 24] done to the cargo, did not invalidate the bond, the consignee

The Prince George. 4 Moore's P. C. Rep.

having, by the law of New York, a specific lien on the ship, and the master, being without funds, from which such damage could be paid, had no other remedy than to hypothecate the ship, to save it from being arrested and sold by the Admiralty Court in New York; that the bill of exchange was only a collateral security, and did not substitute personal security for the hypothecation of the ship.

Dr. Phillimore, for the respondents, submitted, that the circumstances of the case did not show such a necessity as to warrant the master hypothecating the ship, which was done by him solely for the purpose of meeting the personal demand against himself, in respect of the porter, and the claim of the consignees in respect of the damaged goods.

The following authorities were referred to in the course of the argument: *The Augusta*,¹ *The Vibilia*,² *The Jane*,³ *The Zodiac*,⁴ *Thompson v. The Royal Exchange Insurance Company*,⁵ *Abbott on Shipping*, 128, 129, 130; 1 *Kames's Essays*; *Mercatores*, 128; 3 *Kent's Com.* 168; *The General Smith*.⁶

LORD CAMPBELL. This is an appeal from the Court of Admiralty, in a suit on a bottomry bond.

The learned judge below was of opinion that the bond [* 25] was wholly void, on the ground that the master * had no authority to hypothecate the ship for any part of the money secured by it.

We should have been of the same opinion, if we had taken the same view of the facts of the case which he appears to have done. If the bond had been given as a security for the amount of the damage done to the cargo on the voyage from London to New York, and the value of certain porter, part of the cargo consumed during the voyage, we should have thought it invalid. The appellant's counsel have contended, that by the law of New York, the consignees of the cargo had a specific lien on the ship for any damage sustained by the cargo, in violation of the contract contained in the bill of lading, and that as the master had no funds from which this damage could be paid, he might hypothecate the ship for the amount, so that she might prosecute her voyage, instead of being arrested and sold by

¹ 1 *Dod. Rep.* 283.

³ 1 *Dod. Rep.* 461.

⁵ 1 *Maul. & Sel.* 30.

² 1 *W. Robinson*, 1.

⁴ 1 *Hagg. Adm. Rep.* 320.

⁶ 4 *Wheaton, Sup. Ct. of U. S. Rep.* 498.

decree of the Admiralty Court. If it had been proved that the law of New York gave the lien upon the ship as suggested, we should have thought, upon the general principle, that where the master cannot in any other way raise money which is indispensably necessary to enable the ship to continue her voyage, he may hypothecate the ship : this power would extend to a case where the ship might be arrested and sold for a demand for which the owner would be liable. It seems immaterial whether the necessity for funds arises from such a demand, or to pay for repairs, stores, or port duties.

But in this case, there is no sufficient evidence that by the law of New York, the consignee of goods has any specific remedy against the ship for damage they may have sustained in the course of the voyage. No witness, professing to be acquainted with the law upon the subject, has been examined ; and the witnesses who have * been examined, only use some loose expressions, from [* 26] which a doubtful inference as to the state of the law may be drawn.

It is said, indeed, that we ought, in the absence of evidence, to presume the law to be as contended for by the appellant, the law of England upon this subject being an exception to the law of all other commercial nations. But we apprehend that where reliance is placed by any party upon a difference between the law of England and the law of a foreign State upon such a subject, he is bound by witnesses, or books of authority, to show that there is such a difference. In the present instance, we believe that the presumption would be contrary to the truth ; for, although the law of most commercial nations except England gives a specific remedy against the ship for repairs and stores to fit her out for a voyage, it is only in a few States that this remedy against the ship is extended to damage done to the cargo ; and there is every reason to believe that such is not the law in New York, as it appears that an act was passed by the legislature of that State, giving a lien on the ship only for repairs and stores,¹ leading to the conclusion that the law of that State upon this subject is not further varied from the ancient commercial law of England.

We therefore cannot pronounce for the validity of the bond on this ground ; and if it really had been given entirely in respect of the claim of the consignees of the cargo, we must have affirmed the decree.

But upon carefully examining the evidence and the accounts, it appears to us that, with the exception of the sum of three hundred

¹ Acts of 22d Session, c. 1, and 40th Session, c. 59.

and twenty-nine dollars, the money secured by the bond was required for the ship's necessary disbursements at New York. By [* 27] * the charter-party and bills of lading, a sum of 253*l.* for freight was payable at New York. If this had been received by the master, and therewith he had paid all his port charges and outfit, and a demand being afterwards made upon him by the consignees, he had executed the bottomry bond to satisfy this demand; in the absence of evidence of the foreign law upon the subject, we should have considered the bond wholly void. But the depositions show that the master did not receive the 253*l.*, and that the whole of that sum was detained by the consignees to cover the amount of the damage done to the cargo, except a balance of eight dollars ninety-one cents. The master had no means of compelling payment of the freight in full. He, therefore, had no funds from which he could pay port duties and other necessary disbursements to enable him to prosecute his voyage, and it is admitted that he could not raise the necessary funds for hypothecating the ship. The bond, therefore, was to secure money borrowed to pay port duties and such other necessary disbursements, not merely to satisfy the demand of the consignees for damage done to the cargo. But we cannot say that the bond is good for the whole. In the principal sum of one thousand one hundred and sixty-seven dollars, for which it is given, is included an item of three hundred and twenty-nine dollars in respect of porter, part of the cargo, consumed during the voyage. The evidence certainly shows that the ship was well supplied with water and stores of all sorts, and that it was from the unusual length of the voyage that it became necessary for the crew and passengers to use this porter. But there is no evidence before us that by the law of New York, the consignee of the porter could have detained the [* 28] ship till his demand was satisfied. The master * was arrested; but assuming that he was lawfully arrested, it is impossible to lay it down for a rule that the master may hypothecate the ship for any demand in respect of which he himself is liable to be arrested in a foreign country.

For the sum of three hundred and twenty-nine dollars, and the maritime interest calculated upon that sum, the bond cannot be supported. But it is a well known doctrine in the admiralty courts that a bottomry bond may be good *pro tanto*, and void for the residue.

Some other small items have been pointed out to us as having been expended before there is evidence of any negotiation for a bottomry bond, but we think that these items may be fairly included in the sum to be secured, and that we may presume they were advanced in contemplation of such a security. Bottomry bonds, for the benefit of

The Thirteenth of June. 4 Moore's P. C. Rep.

the ship-owners, and the general advantage of commerce, are greatly favored in courts of admiralty; and where there is no suspicion of fraud, every fair presumption is to be made to support them.

Upon the whole, their lordships will recommend to her Majesty that the decree of the court below be reversed, and that, deducting the amount of the three hundred and twenty-nine dollars and interest, there be a decree in favor of the appellant, for the principal and interest secured by the bond, with the costs of the appellant below, leaving the parties respectively to pay their own costs of appeal.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF BARBADOES.

*THE THIRTEENTH OF JUNE.

[*167]

Francisco Fernandez Guimaraens, *Appellants*, and William Preston, Esq., the commander, and the officers and crew of her Majesty's ship Curaçoa, and the Queen, *Respondents*.¹

July 13, 1842.

Seizure and condemnation of a Portuguese vessel, under 2 & 3 Vict. c. 73, affirmed on appeal by the judicial committee.

Proceedings taken against a vessel seized under the 2 & 3 Vict. c. 73, are to be according to the rules and regulations, established under the 2 & 3 Will. IV. c. 51, and not according to the forms of the civil law.

The affidavit of a person present at the seizure, though not the seizer himself, is sufficient to ground a monition citing the master in particular, and all others in general, to appear, &c. Evidence of the owners' claim not tendered in the court below, received by the judicial committee on the hearing of the appeal.

THIS was an appeal from a sentence of condemnation for a breach of the Act 2 & 3 Vict. c. 73, for the suppression of the slave-trade, pronounced on the 25th of June, 1840, by the judge of the Vice-Admiralty * Court of Barbadoes, against the vessel [*168] called The "Treze de Junho," or "Thirteenth of June," her cargo, tackle, apparel, and furniture; whereof the appellant, Francisco Fernandez Guimaraens, was sole owner.

¹ Present: The Lord President, Lord Brougham, Sir Herbert Jenner Fust, and the Right Honorable Dr. Lushington.

The Thirteenth of June. 4 Moore's P. C. Rep.

The statute 2 & 3 Vict. c. 73, after reciting, that it is expedient, among other things, that power should be given to the High Court of Admiralty, and to courts of Vice-Admiralty, to adjudicate upon vessels and their cargoes captured for having been engaged in the slave-trade, &c., and declaring that her Majesty had been pleased to issue orders to her cruisers to capture Portuguese¹ vessels engaged in the slave-trade, and other vessels engaged in the slave-trade, not being justly entitled to claim the protection of the flag of any state or nation,—enacted, “that it shall be lawful for any person or persons in her Majesty’s service, under any order or authority of the Lord High Admiral, or of the commissioners for executing the office of Lord High Admiral of Great Britain, or of any one of her Majesty’s secretaries of state, to detain, seize, and capture any such vessels, and the slaves, if any, found therein, and to bring the same to adjudication in the High Court of Admiralty in England, or in any Vice-Admiralty Court within her Majesty’s dominions, in the [* 169] same way as if such vessels * and the cargoes thereof were the property of British subjects.”

By the third section it is enacted, “that it shall be lawful for the High Court of Admiralty of England, and for all courts of Vice-Admiralty in any colonies or dominions of her Majesty beyond the seas, to take cognizance of, and try, such Portuguese vessel which shall be detained or captured either to the north or to the south of the equator, under any such order or authority, and any vessel which shall not establish, to the satisfaction of such court, that she is justly entitled to claim the protection of the flag of any state or nation, and to condemn any such vessel, and adjudge as to the slaves found therein, in like manner and under such and the like rules and regulations² as

¹ Such parts of this statute as apply to Portuguese vessels have been repealed by the 5 & 6 Vict. c. 114, and vessels of that nation can now only be seized and made forfeit under the authority of the treaty between Great Britain and Portugal of the 3d of July, 1842. The jurisdiction of her Majesty’s Vice-Admiralty Court is superseded by the Mixed Commission Courts, established under that treaty, and the judgment of the commission is declared definite and without appeal. (See Treaty, Annex, B., Art. III., VII., and IX.)

² The practice to be observed in suits and proceedings in the courts of Vice-Admiralty abroad is governed by certain rules and regulations established by an order in council, under the 2d & 3d Will. IV. c. 51, printed and circulated by the Board of Admiralty. The rules and regulations are accompanied by tables of fees for the courts of vice-admiralty in the various colonies, and contain a copious appendix of forms of pleadings, &c.: they are divided into separate sections, that referred to being section 25, headed, “Prosecutions for a breach of the laws for the abolition of slavery.”

“Foreign slave-vessels cannot be detained at sea except for a violation of treaty, and

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are contained in any act or acts of parliament in force, in relation to the suppression of the slave-trade, by British-owned ships, as fully

then only by such of his Majesty's ships of war as are provided with special instructions for that purpose, nor can the search of any such foreign slave-vessel be made by any officer holding a rank inferior to that of lieutenant in the navy of Great Britain.

"With respect to these seizures of foreign slave-vessels, the vice-admiralty courts have no jurisdiction. The only tribunals which can legally adjudicate thereon are the 'Mixed Commission Courts,' established in pursuance of treaties with certain foreign powers.

"When a vessel engaged in the slave-trade is seized for a violation of the municipal laws of the United Kingdom of Great Britain and Ireland, it is the duty of the captor to send her, with the slaves, if any, on board, for the purpose of adjudication, to the nearest and most convenient port in any colony or settlement where there is a Vice-Admiralty Court.

"Upon the arrival in port of the vessel and slaves seized, and also in case of a seizure of slaves on shore, an immediate representation of the seizure is to be made to the registrar of the Court of Vice-Admiralty, and the seizer is to make an affidavit, (in the form prescribed,) detailing all the circumstances connected therewith, and stating especially by what breach of the law the forfeiture of the slaves has been incurred. And, in the case of the seizure of a vessel, there are to be annexed to the affidavit, and verified therein, all original papers that may have been delivered up to the seizer, or, if the ship's papers shall have been concealed, thrown overboard, or otherwise destroyed, that fact is to be stated in the affidavit.

"The affidavit being duly sworn and exhibited before the judge or surrogate, he is to decree a monition to issue, returnable fourteen days after service, citing by name the owners or persons implicated, if known, and all others in general, to appear and show cause why the forfeiture should not be decreed and the penalties pronounced for.

"Where the owners or persons implicated are not known, the monition must only cite all persons in general. If the monition contain the names of the owners or others, from whom penalties are sought to be recovered, it should be personally served on the parties, in the manner of other instruments requiring personal service. In all cases the monition must be served on the Exchange or the Court-house or other public place, as before directed in derelict cases. If the monition issue against all persons in general, and not against any individual in particular, it need not be served in the manner last mentioned.

"If, when the monition has been served, no appearance be given, the judge, upon the return of the monition, is, immediately, or on the next regular adjourned court day, to proceed to pronounce, by interlocutory decree, for the forfeiture of the slaves (if any) and vessel, and for the penalties due by law, without requiring any further evidence.

"If it shall appear to the judge, by affidavit, that personal service cannot be effected on the parties, if any, named in the monition, by reason that they have purposely absented themselves, to avoid service, the judge is to pronounce his decree; but if he has reason to believe that the parties are *bonâ fide* ignorant thereof, he ought to reserve his judgment, so far as relates to the penalties sued for, and also as to the slaves and vessel, if any doubt shall arise upon the evidence.

"In the case of a monition citing all persons in general, and not describing any person by name, no penalties against individuals can be pronounced for; but if the persons by whom the offence has been committed shall afterwards be discovered, a subse-

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and effectually, to all intents and purposes, as if all the
[* 170] powers, authorities, and provisions contained in * such acts

quent monition may issue in the same suit, against him or them, for recovery of the penalties.

"In order to move for the interlocutory decree, a case, together with a copy of the affidavit, must be placed in the hands of counsel, as in other cases.

"At any time before the interlocutory decree, a claim may be given on behalf of the owners, and the claimant may, if he think fit, require the seisor to proceed by plea and proof, and pray him to be assigned to give his information or libel, to which the claimant may give in a responsive plea or allegation.

"To the claim must be annexed an affidavit, containing the names, additions, and residence of the owners, and a detail of all the circumstances on which the claimant means to rely as the ground of his defence. The same course, in all respects, is to be pursued in giving in the claim, as before directed, in derelict cases.

"When a claim is given and no libel prayed, the court may proceed to adjudge the case on the facts and circumstances stated in the affidavit of the seisor, exhibited on praying the monition, and in the claim and affidavit in support thereof.

"Should the judge consider the case not sufficiently proved by such evidence, to enable him to proceed to sentence, he may direct a libel to be filed by the seisor, and witnesses to be examined thereon, to which libel the claimant's proctor may give a responsive plea or allegation, and in like manner examine witnesses. The proceedings will then be the same as directed in cases contested by plea and proof.

"In the event of the judge not in the first instance condemning or restoring the slaves, he is required in certain cases, by the Act 5 Geo. IV. c. 113, to order them to be valued; and, upon the valuation being approved by the court, they are to be delivered over, pursuant to the act, to persons specially appointed to receive, protect, and provide for them. The same course is to be followed when a decree restoring or condemning slaves is suspended by appeal. And in no case whatever are slaves to be delivered to claimants on bail, to answer the adjudication.

"Where a seizure of several slaves, belonging to the same owner, is made by the same seisor, for one and the same cause of forfeiture, there is to be only one affidavit and one monition required to enable the court to proceed.

"Where several slaves, whether belonging to the same or different owners, are seized for the same cause of forfeiture, but by different seisors, there must be a separate affidavit by each seisor, but the slaves may all be included in one monition.

"Where several slaves, belonging to the same or to different owners, are seized by the same seisor or by different seisors, for different causes of forfeiture, there must be as many affidavits and monitions as there are different causes of forfeiture; but the judge may afterwards, in his discretion, consolidate the proceedings, so as to form but one suit to come before the court for hearing.

"Care is to be taken, in consolidating proceedings, that the monition, and also the libel when that proceeding is required, be drawn conformably with the several circumstances, and that the different seizures be described in separate articles or counts of the libel or information.

"In order to avoid the injury which owners may sustain by the delay of the seisor to proceed, any claimant or owner may apply to the court for a monition against the seisor, returnable in three days after service, requiring him immediately to proceed to the adjudication of any slave or slaves so claimed."

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were repeated and reënacted in this act, as to such High Court of Admiralty, or courts of Vice-Admiralty."

* By section four, it is enacted, "That every such vessel [* 171] shall be subject to seizure, detention, and condemnation, * under any such order or authority ; if, in the equipment of [* 172] such vessel, there shall be found any of the things herein-after mentioned ; namely, first, hatches, with open gratings, instead of the close hatches which are usual in merchant vessels : secondly, divisions or bulk-heads in the hold or on deck, more numerous than are necessary for vessels * engaged in lawful trade : [* 173] thirdly, spare plank, fitted for being laid down as a second or slave deck : fourthly, shackles, bolts, or handcuffs : fifthly, a larger quantity of water in casks or in tanks than is requisite for the use of the crew of the vessel as a merchant vessel : sixthly, an extraordinary number of water-casks, or of other vessels for holding liquid, unless the master shall produce a certificate from the custom-house at the place from which he cleared outwards, stating that a sufficient security had been given by the owners of such vessel that such extra quantity of casks or of other vessels should only be used for the reception of palm oil, or other purposes of lawful commerce : seventhly, a greater quantity of mess-tubs or kids than are requisite for the use of the crew of the vessel as a merchant vessel : eighthly, a boiler of an unusual size, and larger than requisite for the use of the crew of the vessel as a merchant vessel, or more than one boiler of the ordinary size : ninthly, an extraordinary quantity either of rice, or of the flour of Brazil, manioc or cassada, commonly called farina, of maize, or of Indian corn, or of any other article of food whatever, beyond what might probably be requisite for the use of the crew ; such rice, flour, maize, Indian corn, or other article of food, not being entered on the manifest as part of the cargo for trade : tenthly, a quantity of mats or matting larger than is necessary for the use of the crew of the vessel as a merchant vessel : any one or more of these circumstances, if proved, shall be considered as *prima facie* evidence of the actual employment of the vessel in the transport of negroes or others, for the purpose of consigning them to slavery, and the vessel and cargo shall * thereupon be condemned to the crown, unless it be esta- [* 174] blished by satisfactory evidence on the part of the master or owner, that such vessel was, at the time of her detention or capture, employed on some legal pursuit, and that such of the several things above enumerated, as were found on board of such vessel at the time of her detention, or had been put on board on the voyage on which,

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when captured, such vessel was proceeding, were needed for legal purposes on that particular voyage."¹

The "Treze de Junho" left the port of Rio de Janeiro on the 28th of March, 1840, under Portuguese colors, commanded by José da Lomba, bound to the port of Benguela, on the coast of Africa. On the 31st of March, 1840, she was seized by her Majesty's ship of war Curaçoa, William Preston, Esq., commander, and despatched to Rio de Janeiro, in charge of Mr. Roger Lucius Curtis, mate of her Majesty's said ship, under instructions that proceedings should be instituted against the master in the Mixed Commission Court there established. On her arrival at that port, a strict and careful survey was made, by order of T. B. Sullivan, Esq., commodore of the second class, and senior officer of her Majesty's ships and vessels on the east coast of South America: and on the 26th of April, 1840, she was, by the orders of the commodore, navigated to the island of Barbadoes, in charge of the mate and an English crew, (her master and commander, José da Lomba, being on board,) to be proceeded against in the Vice-Admiralty Court of that island.

[*175] * On the 3d of June, and immediately upon her arrival at Barbadoes, an affidavit was made by Curtis, wherein he stated, "that on the 30th of March, 1840, whilst cruising off Cape Trio, The Curaçoa fell in with the said brigantine or vessel, and Captain Preston sent a boat, with William Tead, his second lieutenant, and William Parker, master, to examine her, and that deponent accompanied them, and was present at the said examination; and that upon the return of the said boat, William Tead informed the said Captain Preston, that there was on board of her a considerable quantity of farina, stowed in bulk, not on the manifest, and in a much greater proportion than would be required for the use of her crew: that buried in the farina were found several new water-suckers, two pumps, also a slave whip, and a rattle: that in her fore-hold were four leaguers and four hogsheads: on deck, two pipes, seven half pipes, and five quarter pipes, all water-casks: the casks in the hold, one of which was nearly empty, were stowed underneath part of her cargo, and could not be required for the use of the crew on the voyage: that in the after part of her hold, near the helm, were found four shackles, and in every part of the hold were considerable quantities of firewood, much more than requisite for her consumption on the voyage: that the main hatchway was of unusual dimensions for a vessel employed in fair mercantile traffic: that the long boat was

¹ This section is incorporated *verbatim* in the Treaty of 1842, Art. IX.

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needlessly large for a coast trader, besides a large canoe, and a jolly boat: the cook-house, also, was of large dimensions, and the cabin had every appearance of having been used for slaves on a former occasion: whereupon the said Captain Preston seized the said brigantine as liable to forfeiture to her Majesty *for [* 176] having such articles on board, and directed deponent to take her to Rio de Janeiro, to be brought before the 'Mixed Commission;' and deponent further said, that having arrived at Rio de Janeiro, Thomas Bale Sullivan, Esq., commodore of her Majesty's ships and vessels on the coast of South America, caused a survey to be had of the said brigantine, and at which survey deponent was present, and the particulars thereof were set forth in a paper writing annexed, and that by the further orders of the said Commodore Sullivan, he had brought the said brigantine into the port of Carlisle Bay, in that island."

Appended to the affidavit was part of the ship's papers, and an account of the survey, as deposed to.

On the 4th of June the usual monition issued under the seal of the Vice-Admiralty Court of Barbadoes, at the suit of the crown, citing the said José da Lomba in particular, and all persons in general, having, or pretending to have, an interest in the said vessel or cargo, to appear on the fourteenth day after service, and show cause, if they had or knew any, why the brigantine should not be pronounced to have been equipped for the slave-trade, contrary to the provisions of the statute or statutes in such case made and provided, and as such, or otherwise, subject and liable to forfeiture and condemnation, and why the penalties due by law should not be pronounced for, with the usual intimation.

The monition was served personally on José de Lomba, but no claim or appearance was entered by him, or on his behalf, or on behalf of any other person. A commission of unlivery having been awarded, and the cargo unladen, it appeared that a quantity of farina, *in bulk, in bags averaging one hundred and [* 177] twelve pounds, or thereabouts, each, and not included in her manifest, was landed from her.

On the 25th of June the cause came on by special appointment, when affidavits and exhibits were read by the registrar, according to the usual practice.

The affidavits included those already stated, with further depositions respecting the unlivery of the cargo.

The exhibits consisted of the ship's papers, the muster-roll, register, and manifest, and comprised two letters of instructions from Guimaraens, the owner of the vessel.

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The first (which related to other transactions) was addressed to Antonio Joaquim Fencira Torres, who appeared by the manifest to be one of the consignees of the present cargo, and was as follows:—

"St. John's Bar, 7th December, 1839.

"Sir,—By the brigantine Umbellina, Captain Antonio Jose Pereira, (the supercargo Francesco Jose,) I was favored with yours of the 2d November, ultimo, accompanied with thirty-one volumes, (slaves,) marked A, which you had shipped on your account, in the said brigantine, to my consignment, which I sold to Jose Joaquim, a very worthy person, at six months' credit, the net proceeds being reis six thousand three hundred and sixty-five, dollars six hundred and eighty, as you will see by the annexed accounts, which sum, in conformity to your order, I passed into the hands of Manuel Perreira, by a bill drawn and indorsed by me and accepted by the said purchaser, but I render myself responsible for this sale, and for all others that you make of people which may come consigned to me."

[* 178] * "Your people (slaves) arrived in very good order, and on that account I obtained higher prices than have been obtained for any others, hoping that you will be satisfied and continue your favors; the cargo of the brigantine Umbellina brought various prices, yours being the highest, the lowest at two hundred and fifty-five dollars, for which reason, whenever you have to make a remittance on your account it must be a good one, because the difference in price obtained is worth while."

"6th March, 1840.

"I confirm all I have said above, on the 7th of December, of last year, and of the 10th of January, of the present."

"Inclosed you will find the receipt of delivery, which I made to Manuel Perreira, of the net proceeds of the volumes (slaves) which you consigned to me by the brigantine Umbellina, according to your order."

"The brigantine of the 8th of December arrived here on the 14th of last month in safety, as also the forty-five slaves, which, for your account, you shipped in the said brigantine, for which I congratulate you," &c. (Signed) "JOSE JOAQUIM, MARQUES D'ABREN."

The second was a letter of instruction, from the owner, addressed to the master and commander, with others, in the following terms:—

"Captain José da Lomba, in his absence (as to what relates to the brigantine) to the mate, Jose Joaquim Gomer Vianna, and the consignment of goods and merchandise to Jose Joaquim Teixeira, and in the absence of both to Antonio Joaquim Terreira Torres."

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* "*Rio Janeiro, 27th March, 1840.* [*179]

"I have given to your command the brigantine 'Thirteenth of June,' my property, which vessel being laden and cleared to-morrow, if the weather permits, you will sail direct for the port of Benguela, with great caution, in order to make a good and sure voyage. With this I accompany a public form of writing, which proves that I have purchased the said vessel when she was rigged as a smack, in which she made four voyages from Benguela to this port, always laden with wax, honey, oil, and urzella, which is proved by the certificates of manifests taken from this custom-house, which I also deliver to you; which documents you must show in the event of your being boarded by any Portuguese or English cruiser.

"In the same brigantine I loaded the goods and merchandise, as will appear by bills of lading and invoice, amounting to ——— dollars, to your consignment, which you will take charge of on your safe arrival; disposing of the net proceeds in wax, ivory, and oil, to load the said vessel with, and any other cargo you may obtain on freight, when you will return to this port as soon as possible.

"The amount of freight will be 2,320 dollars, 700 reis, as will be seen by the book of cargo, which I give you; which you will receive, and apply to the necessary expenses of the vessel with the greatest economy. Your wages will be 700 dollars, on your safe arrival; the mate, 100 dollars; the boatswain, 100 dollars; five seamen, at 45 dollars; and seven slaves belonging to the vessel, with whom you must be very cautious, in order that they may not escape.

"I hope that you will avail yourself of the most expeditious * means for the benefit of this transaction, and speedy [*180] arrangement for your departure for this place. As soon as you arrive, you must inform me, and continue to do so, of what occurs, whenever there is an opportunity, even by way of Angola. I have signed two letters of the same tenor; giving you one for your guidance, and another signed by you, to avoid misunderstanding.

"I wish you a prosperous voyage and good health, and am

"Your obedient servant,

"FRANCISCO FERNANDEZ GUIMARAENS."

"For support of the crew, I have shipped twenty-five bags of farina."

The certificate of the vice-consul at Rio de Janeiro also bore date the 27th of March, 1840, and stated that the master had verified his

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crew, consisting of fifteen persons, a list of which was given, containing the names of the master and others, their ages, country, condition and wages. Among them the cook was entered as José, a native of Africa, and, in lieu of wages, "gratis" was written; and under the title of "Lads" there were six additional names entered, and their condition described as "slaves of Francisco Fernandez Guimaraens."

The cause came on for hearing before Mr. John A. Beckles, sole judge of the Vice-Admiralty Court of Barbadoes, the registrar, marshal, and sworn interpreter being present, on the 25th of June, 1840, when, upon the evidence produced, and upon motion of the [* 181] solicitor-general, (no party appearing for the * owner or the master of the vessel,) the ship *Treze de Junho* (Thirteenth of June) was, by interlocutory decree, pronounced "to have been, at the time of the seizure thereof, illegally equipped for the transport of negroes and others, for the purpose of conveying them to slavery, contrary to the provisions of the acts 2 & 3 Vict. c. 73, entitled, &c., and, as such or otherwise, subject and liable to forfeiture," and condemned accordingly.

On the 20th of March, 1841, an appeal was duly made and interposed on behalf of the appellant, the owner of the vessel, and others, owners of the cargo, and brought into the registry of the High Court of Admiralty.

The appeal being admitted and referred to the Judicial Committee, the proctor, on behalf of the appellants, brought in an attestation and claim, with various exhibits, on behalf of the appellants, and obtained the usual inhibition, citation, and monition.

The exhibits thus produced consisted of a certified copy of the terms of the deed of purchase of the brigantine *Treze de Junho*, by the appellant, a copy of a protest made by the appellant, and José de Lomba, the master, taken and entered at the general consulate of Portugal, against the commander of her Majesty's ship of war *The Curaçoa*, for the caption of the brigantine; copies of the manifests with which the said vessel entered and discharged at the custom-house at Rio de Janeiro, after two several voyages, in 1837 and 1838, from Benguella; and a certificate, together with the tenor of a decree pronounced *ex parte*, on the 30th of April, 1840, by Nicholas de

Silva Lisboa, the judge conservative of British subjects in [* 182] Rio de Janeiro, notifying * that certain acts of justification had been commenced by the owner of the ship *Treze de Junho*, then detained by the British ship of war *Curaçoa*, and containing the proceedings thereon. These consisted of the protest of the owner against the seizure, and petitions for the examination of

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witnesses to prove the illegality thereof; the term of the privileges and immunities conceded by the Mixed Commission to subjects of the British nation; the deposition of the witnesses thus tendered, and the judgment, affirming the matter thereof proved.

With this additional evidence, the appeal now came on to be heard.

Mr. Burge, Q. C., and *Dr. Phillimore*, for the appellants. The rules and regulations issued under the authority of the 2 & 3 Will. IV. c. 51, for regulating the practice of the Vice-Admiralty Courts abroad, are not applicable to a seizure of a Portuguese ship, under 2 & 3 Vict. c. 73. The statute of Victoria, being a penal statute, cannot be made more extensive than the words express; and the words in the third section, for the trial of vessels engaged in the slave-trade, do not so refer to the previous statute of 2 & 3 Will. IV. c. 51, as to import the regulations made under that statute into the act of Victoria. These rules and regulations cannot be applied to the case of a foreign ship; for the effect would be to alter the form of proceeding provided by the civil law. In the present case there was neither libel or information, as required by the civil law; but the proceedings were wholly regulated by the rules under the 2 & 3 Will. IV. c. 51. But even these rules were not *adhered [*183] to; for the affidavit upon which the monition was grounded was made, not by the seisor, as required by the twenty-fifth section of the rules, but by Curtis, who was a mere looker-on. All the proceedings were *ex parte*, behind the back of the owner, and in his absence; and were consequently both illegal, as well as informal. Even if the proceedings were regular, the evidence would not justify the sentence; since there was nothing either in the ship's appearance, her cargo, or manifest, from which it could be legally presumed that she was engaged, or about to be engaged, in the illegal traffic of the slave-trade. There was no evidence of there being an extraordinary quantity of provisions, or more than was necessary for the crew.

The *Queen's Advocate*, (Sir John Dodson,) and the *Attorney-General*, (Sir Frederick Pollock,) for the respondent. By the 2 & 3 Vict. c. 73, Portuguese vessels were placed under the municipal law of Great Britain, and are to be proceeded against in the same manner "as if such vessels, and the cargoes thereof, were the property of British subjects." The mode of proceeding is provided for by the twenty-fifth section of the rules for Vice-Admiralty Courts, esta-

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blished under the 2 & 3 Will. IV. c. 51.¹ These regulations have been strictly complied with. The objection, that the affidavit was not made by the commander, or seisor, but by Curtis, the mate of the ship of war *Curaçoa*, is untenable. Curtis accompanied the second lieutenant and the master upon the search, and was, in fact, one of the seizors; he was also in charge of the vessel when she arrived at

Barbadoes. The object of the affidavit is to ground the [*184] subsequent process of *a monition; and it is not the party making it, but the matter contained in it, that is essential.

In the margin of the form appended to the rules it is stated, that it must contain a full and specific account of the facts constituting the breach of the law, and that is amply complied with in this instance. Then the question resolves itself into one of a violation of the act; that is sufficiently manifest, both from the fittings of the vessel, as well as her cargo, provisions, and manifest. She had more farina than could, under any circumstances, be requisite for her crew; the articles, too, concealed, were such as to lead to the evident conclusion that she was engaged for an illicit traffic, and justified both her detention and condemnation. There is nothing in the evidence, produced for the first time here on behalf of the owner, which can affect the sentence below.

SIR HERBERT JENNER FUST. Their lordships are of opinion that the sentence of the court below was right, and must be affirmed. The proceedings subsequent to the seizure of the vessel, taken at Barbadoes, were conformable to the act 2 & 3 Vict. c. 73, and the rules prescribed under the 2 & 3 Will. IV. c. 51. The vessel being engaged in the slave-trade, was seized at Rio de Janeiro, for a violation of the municipal law of Great Britain, and was sent, in pursuance of the regulations under the 2 & 3 Will. IV. c. 51, to the nearest and most convenient port where a Court of Vice-Admiralty was established; that port was Barbadoes. Upon her arrival she was proceeded against by monition, according to the practice established under the twenty-fifth section of the rules and regulations; and the monition, as appears by the certificate of the marshal to

[*185] whom *it was directed, was served personally on José da Lomba, the master and commander. It appears that no proceedings against the condemnation were taken, either by the owner or by the master; though the latter had full notice of the proceedings, and that if no cause was shown, a judgment of condemna-

¹ *Ante*, p. 169

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tion would be pronounced. The sentence, therefore, which followed, though *ex parte*, cannot be said to have been made behind the back of the owner, or without his knowledge, or the means being afforded him of resisting it. Still their lordships were of opinion that it would best conduce towards the ends of justice to allow the owner to produce before them such evidence as he thought material to his defence; and they have, accordingly, allowed him to bring in the documents contained in the supplemental appendix. They have considered the various documents he has produced, but do not think them sufficient to rebut the case proved in the court below. The appellant complains of the removal of the vessel from Rio de Janeiro to Barbadoes; but that was in conformity with the law. And he cannot say that the vessel was condemned behind his back; for José da Lomba, his master, was carried with the vessel to Barbadoes, and was sufficiently acquainted with the nature of the trade in which the vessel really was engaged to have made any affidavit, or produced any evidence, that could be favorable to his owner's case, if such had existed. But neither at Rio de Janeiro nor at Barbadoes does he make any such deposition, nor is there any evidence that the voyage which the ship was about to make, when seized, was a legal mercantile adventure. Under these circumstances, their lordships are of opinion that the sentence of the court below was right, and must be affirmed, with costs.



ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

* THE GAZETTE.

[* 272]

William Batchelor Brownlow and others, *Appellants*; and George Garson and others, *Respondents*.¹

July 3, 1843.

Appeal from the High Court of Admiralty not prosecuted; cause remitted, with costs.

THIS was originally a cause of damage, promoted by the respond-

¹ Present, The Lord President, (Lord Wharncliffe,) Lord Brougham, Mr. Baron Parke, and Mr. Justice Erskine.

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ents, owners of the ship and cargo, and the master, officers, and crew, against the appellants, the owners of the steam-vessel *Gazelle*.

The cause was heard on the 11th of December, 1842, before the judge of the Admiralty Court, who pronounced for the damage, and condemned the owners of *The Gazelle* and the bail in costs.

An appeal having been asserted, and the usual proceedings taken in this court, the cause was assigned for hearing on the 1st of June, 1843.

The proctor for the appellants having, however, exhibited a proxy, and declared his parties, proceeded no further in the appeal.

Dr. Phillimore moved their lordships to remit the cause, and condemn the appellants in costs.

Which was ordered accordingly.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF GIBRALTAR.

[* 273]

* THE WINWICK.

In the Matter of the Petition of Miles Barton and others *v.* Barron Field.

February 14, 1842,¹ and November 27, 28, 1843.²

This court will not visit a judge of an inferior court with the penal consequences of an attachment for contumacy and contempt, for disregarding an inhibition, unless such disobedience is wilful, and proceeded from improper motives.

An inhibition to the judge of the Vice-Admiralty Court at Gibraltar, inhibiting him from doing any thing prejudicial to the parties appellant, pending an appeal, is not to be disregarded at his discretion, although he may consider that he is acting for the benefit of all parties.

Decree for a sale of a vessel condemned, after appeal asserted and inhibition served person-

¹ Present, Lord Brougham, Lord Campbell, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

² Present, Lord Cottingham, Lord Campbell, the Vice-Chancellor, (Knight Bruce,) and the Right Hon. Dr. Lushington.

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ally on the judge, held not such a contempt, under the circumstances of the case, as to entitle the owners to an attachment against the judge, for costs and damages incurred thereby.

THIS was an application for an attachment against Barron Field, Esq., the late judge of the Vice-Admiralty Court at Gibraltar, for contumacy and contempt, in decreeing the sale of the ship *Winwick*, her tackle, &c., after an inhibition had issued under the seal of the Judicial Committee of the Privy Council, inhibiting him, pending the appeal, from doing or attempting any thing to the prejudice of the parties appellants.¹

* By an order in council, bearing date the 13th of July, [* 274] 1840,² reversing the sentence of the court below, it was, among other things, ordered that the appellants (the owners of the ship *Winwick*) "be at liberty to proceed as they may be advised, against any person or persons whom it may concern, for further compensation for any loss they may have sustained, or expenses they may have incurred, by reason of the sale of the said ship, under the authority of the court below, after service of the inhibition under seal of this court."

On the 14th of May, 1841,³ Miles Barton presented a petition on behalf of himself and the other owners of the ship *Winwick*, praying their lordships to decree a monition against the judge of the Vice-Admiralty Court at Gibraltar, to appear and show cause why he should not pay the costs and damages incurred by the illegal sale of the ship. No affidavits were filed in support of this application, to show that any damage had been incurred by the sale of the ship.

Dr. Nicholl, for the motion, relied on the rules and regulations regarding appeals from the Vice-Admiralty Courts abroad, made in pursuance of 2 Will. IV. c. 51,⁴ and cited the following author-

¹ The proceedings which gave rise to this application are reported *ante*, vol. 2, p. 19, on the appeal from the sentence of the Vice-Admiralty Court of Gibraltar.

² *Ante*, vol. 2, p. 34.

³ Present, Mr. Baron Parke, Sir Herbert Jenner, the Right Hon. Dr. Lushington, and Mr. Justice Littledale.

⁴ These rules being printed only for the purpose of distribution to the Vice-Admiralty Courts, and not generally accessible, are here inserted:—

"All appeals from decrees of the Vice-Admiralty Courts are to be asserted by a party in the suit, within fifteen days after the date of the decree, which is to be done by the proctor, declaring the same in court, and a minute thereof is to be entered in the Assignment Book; and the party must also give bail, within fifteen days from

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[*275] ities: The case of The Marshalsea;¹ Dict. per Lord Stowell;² The Ship William;³ The Dove;⁴ The Nordiska Wanskapen.⁵

The *Queen's Advocate*, (Sir John Dodson,) *contra*.

MR. BARON PARKE. There ought to have been an affidavit, as to damages. The application ought to have been for a rule to [*276] show *cause why an attachment should not issue, and the present petition must be dismissed. Their lordships, however, think that leave should be given to amend the petition, and to make a fresh application.

On the 14th of February, 1842,⁶ a further petition was presented by Miles Barton, and the other owners of the ship, praying for a monition against the worshipful Barron Field, the judge of the Admiralty Court of Gibraltar, to appear and show cause why he should not be attached for contumacy and contempt, for decreeing the sale

the assertion of the appeal, in the sum of 100*l.* sterling, to answer the costs of such appeal.

"In all cases, however, in which an appeal is asserted, except respecting slaves, the judge may proceed to carry his sentence into execution, provided the party in whose favor the decree has been made give bail to abide the event of the appeal, by two sureties, in the amount of the value of the property or subject in dispute, together with the further sum of 100*l.* sterling, to answer costs, in the event of the same being awarded by the Superior Court.

"The party appealing, having complied with these regulations, is then to cause the judge and registrar to be served with an inhibition from the High Court of Admiralty, restraining them from further proceeding in the cause, and also with a monition to transmit the process.

"This process will consist of a fair copy of the proceedings, under seal of the Vice-Admiralty Court, to be made and signed by the registrar, at the expense of the party ordering the same, which is to be transmitted to the Superior Court, pursuant to the monition.

"The proceeds, if in court, or in the hands of any individual, must, on a special monition for that purpose being served, be remitted to the registrar of the High Court of Admiralty, or Court of Appeal."

¹ 10 Coke, Rep. 76 a.

² 1 Add. 21.

³ 6 Rob. Adm. Rep. 310.

⁴ 18th June, 1796.

⁵ 27th March, 1809.

NOTE. In the cases of The Dove and The Nordiska Wanskapen, which were produced by the registrar of the court, a monition was issued against the judge, registrar, and marshal of the Vice-Admiralty Court, to bring in the sums they had respectively received as costs, and which had been disallowed by subsequent decree and taxation.

⁶ Present, Lord Brougham, Lord Campbell, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

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of the ship Winwick, after having been personally served with the inhibition of the Judicial Committee of the Privy Council, inhibiting him from doing any act in the said cause. This motion was supported by the affidavits of Robert Cotesworth and others, from which it appeared that the alleged damages, occasioned by the sale of the ship, amounted to about 1,000*l*.

Mr. S. Martin, in support of the petition.

The *Queen's Advocate*, for Mr. Barron Field, the judge of the Vice-Admiralty Court of Gibraltar.

LORD CAMPBELL. The question is, whether an attachment is to issue against the judge; whether the judge of the Vice-Admiralty Court sold the vessel to the prejudice of the party, the sale being in violation of the order of this court. Their lordships think there is good ground for granting a rule to show cause why he *should not be attached, for decreeing sale after the inhibi- [* 277] tion. The judge must deliver his act on petition the first session of next term.

The act on petition was afterwards brought in on behalf of Mr. Barron Field, the assenter of an appeal; and the proceedings therein, after setting forth the circumstances of the condemnation of the vessel, proceeded to state that, on the 8th of February, 1839, an affidavit of Thomas Smith, of Gibraltar, a ship-builder, was filed, as to the perishable state and condition of the said vessel, and wherein he deposed that he had examined the said vessel, and was of opinion that, since he had appraised the said vessel in the month of January, 1838, she had deteriorated in value \$2,000, the natural effect of the lapse of time and exposure to the weather; and that he was of opinion that a further exposure to the weather, during the then ensuing summer, would very considerably decrease her value; the more so, as she was not then in so good a condition to resist the effects of the weather as when he last examined her; that a motion was thereupon made in the said Vice-Admiralty Court, on the part of the crown and seizer, to decree the vessel to be sold; whereupon the said Barron Field, the judge aforesaid, and acting as such, having first heard advocates and proctors on both sides, did (for the reasons contained in the said affidavit, and in consideration of the constant expense of two ship-keepers to preserve the said vessel, in addition to the incidental expense of occasional salvage assistance which had been incurred, and which were likely to recur with the

then approaching equinoctial gales, which renders the port of Gibraltar very dangerous in certain winds) decree a commission [* 278] to issue for the sale of the said vessel; that, in pronouncing such decree, the said Barron Field never contemplated or intended any act in contravention of the inhibition, so as aforesaid served upon him, and considered, as the fact was, that he was not doing or attempting any thing to the prejudice of the parties appellant, or their said cause of appeal, but that, in directing the vessel to be sold, he was conferring a benefit on whomsoever might thereafter be entitled to the proceeds arising from the sale thereof. The act then set forth the particulars of the sale, and the circumstance of one of the owners' brothers, a partner in a house at Liverpool, being the purchaser, as showing collusion between the parties, and the subsequent proceedings taken in this court, and insisted that the said Barron Field, the judge of the said court, in decreeing the sale of the vessel, acted with perfect good faith both towards the owners and seizers of the vessels, having been called upon to exercise his judicial functions in a case of necessity and emergency, requiring an immediate remedy to protect all parties in the cause from further loss; and he humbly submitted that, by the tenor of the inhibition served upon him, he was not precluded from exercising, in such a case as this, a fair and equitable discretion, when judicially applied to by either of the parties in the cause.

The owners replied to this act on petition, traversing and denying the facts and inferences therein drawn, and denying collusion in the purchase of the vessel, and praying and insisting that the judge might be condemned in all costs and damages consequent on such sale, the amount thereof to be referred to the registrar and [* 279] merchants, to ascertain and report. Both parties * filed affidavits, in support of the various allegations and statements contained in the act and reply.

The *Queen's Advocate*, (Sir John Dodson,) *Sir Thomas Wilde*, and *Mr. Edmund F. Moore*, for Mr. Barron Field. The sale of the vessel was warranted and requisite, under the circumstances of the case, and the decree for the same was not an act in contempt of the inhibition of this court. It was never intended by this court that the judge of the court below should be proceeded against by penal process, for the exercise of his discretion. Even if he were, under the circumstances, liable to such a proceeding, he is not solely liable, and ought not to be proceeded against alone; the party promoting the office of the judge is the responsible party in the suit, and if any one is liable for the supposed damage, occasioned by the sale of the vessel,

he is, and ought at least to have been joined with the judge. Clarke's Praxis in Curiis Ecclesiasticis, tit. 265. If, under such circumstances, a judge was personally liable, he could never safely try a cause of forfeiture without taking a bond of indemnity from the party promoting his office. That is the practice in the United States. *Ross v. Rittenhouse*.¹ No such practice prevails here. In the cases of *The Dove* and *The Nordiska Wanskapen*, the object was to obtain the proceeds, and the motion was to bring them in. There was no breach of the inhibition. No contempt of this court has been committed by the judge below. The language of the inhibition is, that the parties inhibited are not to do or attempt any thing * to the prejudice of the appellants. Here a positive benefit has been done. It was shown that the ship had deteriorated in value, had incurred salvage expenses, was becoming every day less valuable, and was likely at the approaching equinoctial gales to be entirely destroyed. Was the judge of the Vice-Admiralty Court at Gibraltar, in whose custody the vessel was, to direct the parties to apply to this court for an order for sale, and to wait the return of such order? The mischief anticipated might have happened before a meeting of this court took place; and who could so properly examine the evidence of the ship's deterioration as the judge of the court below? It was his peculiar duty. The circumstances presented a case of necessity and emergency, and left him no alternative but the exercise of a discretionary authority; for that he is not liable to an attachment. If the sale had been ordered before service of the inhibition, no question of its propriety could be raised; but the proceeds, the *res*, are secured, and that satisfies the intent of the inhibition. The offence committed by the judge, if any, is an *attentat*; but there are no articles exhibited against Mr. Barron Field for an *attentat*, and they could not be supported, since they must charge, and the proof must be, that the judge's act was wrongfully innovated, or attempted pending the appeal. Lancellott, 2 pars, c. 12, lim. 6, n. 27, 28. And see 1 Add. Rep. 22, 23. The proceeding by attachment is wholly irregular, and, in such a case as this, unheard of. The affidavits of loss occasioned to the owners, by reason of the sale at Gibraltar, are not satisfactory. The evidence amounts to opinion only, is contradicted, and there is strong ground to presume collusion between the owners and purchasers of the vessel. The Prize Acts, 45 Geo. III. c. 72, s. 52, [*281] expressly provide for a sale being made, notwithstanding an

¹ 2 Dallas's Rep. 160.

appeal is pending. And accordingly it has been held, that if a suit be commenced between a captor of a prize and a claimant, and a decree obtained either for or against the claimant, on giving security such sentence or decree shall be put in execution, notwithstanding any appeal. *Thompson v. Smith*.¹

Mr. Martin, Q. C., and Dr. Bayford, for the owners. The proceeding is in strict conformity with the direction of this court. By the original judgment, which was a reversion of the decision of the court below, the owners were to be at liberty to proceed as they might be advised against any person or persons whom it might concern, for further compensation for any loss sustained, or expenses they may have incurred, by reason of the sale of the ship under the authority of the court below, after service of the inhibition under seal of this court. It is clear that this court thought the judge of the Vice-Admiralty Court personally liable for such loss and damage, and accordingly a monition was applied for against the judge, to appear and show cause why he should not pay the costs and damage incurred. On that application this court required an affidavit of damages; this we supplied; and we then asked for a rule that Mr. Barron Field might show cause why he should not be attached for contumacy and contempt, for decreeing the sale. This court granted that application; and we come here now to answer the act on petition delivered in by the judge, and to pray that the rule may be made absolute. The effect of the service of an inhibition on the judge is the same * as the service of a notice of the allowance of a writ of error. The judge's hands are, from that instant, tied; he is, as far as the cause in question is concerned, *functus officio*. *Chichester v. Donegal*.² Inhibitions are borrowed from the canon law; they were not known to the civil law, and arose out of the distinction introduced into the canon law, of allowing an appeal from a grievance; no such appeal was known to the civil law. The inhibition is part of the appeal, and the breach of it is a grievance of which we complain. Corp. Jur. Civ. Dig. 29, tit. 7; Cod. B. VIII. t. 62, l. 3; Ayliffe's Parergon, p. 71, 73. If this is an *attentat*, the wrongfulness of the act is sufficiently pleaded in our reply to the articles exhibited. Lancellott de Attentatis, 359. In the Prize Acts, special provision is made for allowing a sale pending an appeal; such exception proves the general rule.

¹ 1 Sid. 320. And see 2 Keble, 155.

² 1 Add. Rep. 5, 21.

THE RIGHT HON. DR. LUSHINGTON. Several questions of considerable difficulty and importance have been discussed in the course of the argument in this case, but their lordships are of opinion, for the reason which I am about to state, that it is wholly unnecessary for them to enter into the consideration of those questions, or to give any opinion upon them.

The point upon which they intend to decide the case is as follows:—

This is an application, charging the judge of the Vice-Admiralty Court at Gibraltar with having committed a contempt, in directing a decree of sale to pass of the vessel Winwick, after he had been served with an inhibition issuing under the authority of this court.

* Now we do not offer any opinion upon the validity of [* 283] the inhibition; but assuming, for the present, that the inhibition was fully justified in law, in pursuance of the act of parliament, and the practice of the court, the question which arises is this, whether the judge of the Vice-Admiralty Court, in decreeing a sale, was wilfully guilty of any disobedience of the appellate authority.

We are of opinion that it is not sufficient, for the purpose of visiting him with the penal consequences which it has been endeavored to attach upon him, that he may have committed an error of judgment. We think it must be proved to our satisfaction, not only that there was error, but that, in addition to there being error, it was wilful error, and proceeded from corrupt or improper motives.

Now, having considered the whole of these proceedings, we have come to the conclusion that no such culpability attaches to this judge, because we think he may have acted according to the best of his judgment, under all the circumstances of the case. He had to form an opinion as to the true effect and operation of the inhibition; that was evidently to him a difficult question to deal with. And it appearing to their lordships that there was no wilful culpability, we cannot visit him with the consequences which the owners seek to attach upon him by this application.

The determination of their lordships, therefore, is to refuse the application, but without costs.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF
SIERRA LEONE.

[* 284]

* THE GUIANA.

James Logan and John Moore, *Appellants*, and Lieutenant Godolphin James Burslem, the officers, and crew of her Majesty's ship *Viper*, and the Queen, *Respondents*.¹

November 28 and 29, 1842.

The 5th Geo. IV. c. 113, s. 29, enacts, that no appeals shall be prosecuted from any sentence of any Court of Admiralty or Vice-Admiralty, (with the exception of the Cape of Good Hope and eastward thereof,) unless an inhibition be applied for and decreed within twelve months from the time of the decree or sentence being pronounced. By the 3d & 4th Will. IV. c. 41, the appellate jurisdiction given by the previous statute to the High Court of Admiralty was vested in the judicial committee of the privy council; but which court, from its constitution, had no jurisdiction over the appeal until the petition of appeal was referred to them by the crown.

The appellant presented, on the 16th of July, 1841, a petition of appeal from a decree of condemnation pronounced on the 12th of August, 1840, by the Vice-Admiralty Court of Sierra Leone, against a vessel engaged in the slave-trade, contrary to the provisions of the 6th Geo. IV. c. 113. The appeal was not referred by her Majesty to the judicial committee until the 11th of August, 1841, one day before the year expired, and notice of such reference was not given by the clerk in council until the 13th of the same month, one day after the twelve months had expired, when the appellant applied for and obtained an inhibition.

On protest against the appeal, held, 1st, That the 5th Geo. IV. c. 113, was incorporated in the 3d & 4th Will. IV. c. 41; 2d. That the appellant having failed to procure, in compliance with the 29th section of the 5th Geo. IV. c. 113, an inhibition to issue within twelve months from the sentence, was barred his appeal; the provisions of that section being imperative, and leaving no discretion in the court to relax the operation of the act.

THIS was originally a cause instituted in the Vice-Admiralty Court at Sierra Leone, on behalf of Lieutenant G. J. Burslem, the commander, and the officers and crew of her Majesty's schooner of war *Viper*, and our sovereign lady the Queen, against the said
[* 285] brig * or vessel *Guiana*, seized by her Majesty's said ship of war on the 26th of March, 1840, together with her tackle, apparel, furniture, and the goods, wares, and merchandise laden on board her, for forfeiture and condemnation and penalties; by reason of her being, at the time of such seizure, engaged in the slave-trade, contrary to the provisions of statute 5 Geo. IV. c. 113.

¹ Present: Lord Campbell, Sir Herbert Jenner Fust, the Vice-Chancellor Knight Bruce, and the Right Honorable Dr. Lushington.

Proceedings having been taken against the said vessel on the 12th of August, 1840, the acting judge and commissary, by his introductory decree, pronounced the said brig Guiana to have been, at the time of the seizure, thereof engaged in the slave-trade, contrary to the provisions of the above statute, and, as such, subject and liable to forfeiture and condemnation; and condemned the said brig, her tackle, &c., as forfeited; and pronounced that the shippers of the goods, wares, and merchandise laden on board the said brig, were liable to the penalty due by law, that is to say, double the value of the said goods, wares, and merchandise, and that the said goods, wares, and merchandise should be held in deposit until the said penalty was paid: and on the 19th day of the same month, the said acting judge decreed that the cargo should be sold, evidence having been given that the same was deteriorating in value.

In the month of October, 1840, information reached the owners of the vessel that she had been condemned; but in consequence of delays in the transmission of the process, copies of the proceedings did not reach this country until the 20th of July, 1841.

In the mean time, and on the 30th of June, 1841, an * appeal from the decree or sentence was interposed before a [* 286] notary and witness by the appellants' proctor, on behalf of James Logan and John Moore, the owners of the said brig Guiana: as also on behalf of Manuel Francisco Topez, (a Brazilian subject,) the owner of the cargo.

On the 16th of July, 1841, the appeal, together with the usual petition to her Majesty in council, praying that the same might be referred to the judicial committee, was lodged in the registry of the High Court of Admiralty. This petition was laid before the Queen in council on the 11th of August, one day before the expiration of the year from the date of the sentence or decree of condemnation, and referred by her Majesty on the same day to the judicial committee.

Notice of such reference was not, however, given to the appellants' proctor before the 13th, the day on which the registrar of the Court of Admiralty received intimation thereof.

In the mean time, and on several occasions subsequent to the 16th of July, when the appeal and petition had been lodged, the appellants' proctor attended in the registry of the Court of Admiralty and Appeals, and requested the registrar to attend before some surrogate to the judicial committee of the privy council, in order that the usual inhibition might be decreed; but the registrar declined to do so, on the ground that, until the appeal and petition had been answered, it was incompetent for any surrogate to decree an inhibition, or to do any act in furtherance of the appeal.

In consequence of this refusal on the part of the registrar, and no notice having been given of the reference by her Majesty in council until the 13th of August, the inhibition could not be decreed until more than twelve months had elapsed from the date of the decree.

[*287] *By the 29th section of the 5th Geo. IV. c. 113, it is provided, "That no appeals shall be prosecuted from any decree or sentence of any Court of Admiralty or Vice-Admiralty, touching any of the matters provided for in this act, unless the inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced: except when such decree or sentence shall be passed in any Vice-Admiralty Court at the Cape of Good Hope, or to the eastward thereof, in which case eighteen months shall be allowed for the prosecution of the said appeal."

By 3 & 4 Will. IV. c. 41, s. 2, "all appeals or applications in prize suits, and in all other suits or proceedings in the Court of Admiralty, or Vice-Admiralty Courts, or any other court in the plantations in America, and other his Majesty's dominions, or elsewhere abroad, which may now, by virtue of any law, statute, commission, or usage, be made to the High Court of Admiralty in England, or to the lords commissioner in prize cases, shall be made to his Majesty in council, and not to the said High Court of Admiralty in England, or to such commissioners as aforesaid; and such appeals shall be made in the same manner and form, and within such time, wherein such appeal might, if this act had not been passed, have been made to the said High Court of Admiralty or to the lords commissioners in prize cases respectively; and all laws or statutes now in force with respect to any such appeals or applications shall apply to any appeals to be made in pursuance of this act to his Majesty in council.

By section 20, it is enacted, "That all appeals to his Majesty in council shall be made within such times, respectively, within [*288] *which the same may now be made, where such time shall be fixed by any law or usage; and where no such law or usage shall exist, then within such time as shall be ordered by his Majesty in council; and that, subject to any right subsisting under any charter or constitution of any colony or plantation, it shall be lawful for his Majesty in council to alter any usage as to the time of making appeals, and to make any order respecting the time of appealing to his Majesty in council."

By the orders in council of the 9th of December, 1833, made under the general power of this act by his Majesty in council, for the more convenient conducting of appeals and applications in prize suits, and

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in all other suits or proceedings in the Court of Admiralty or Vice-Admiralty, it was ordered and directed, "That all such appeals, applications, suits, or complaints, in the nature of appeals as aforesaid, shall be conducted in the same manner and form, and by the same persons and officers, as the same might have been conducted if such appeals, applications, suits, or complaints in the nature of appeals, had been made as heretofore to the said High Court of Admiralty, the said High Court of Delegates, or to the said lords commissioners in prize cases, respectively."

And it was further ordered and directed, "That it shall and may be lawful for any four or more of the members of the said judicial committee of his Majesty's privy council to appoint such of the advocates of the Arches Court of Canterbury, and of the said High Court of Admiralty, (as now are, or hereafter shall be, duly and lawfully admitted surrogates of such court respectively,) to be surrogates of the said judicial committee of his Majesty's privy council,

*and that it shall and may be lawful for such surrogates, [*289] or any one or more of them who shall be so appointed as aforesaid, in all such appeals, applications, suits, or complaints in the nature of appeals as aforesaid, to administer such oaths or affirmations, and to do and perform all such other acts, matters, and things, and to make all such orders for the forwarding the said appeals, applications, and acts, or complaints in the nature of appeals, in their usual stages, preparatory to the final hearing thereof by the said judicial committee, as shall be found necessary, or have heretofore been done and performed or made by the surrogate of the said Arches Court of Canterbury, and of the said High Court of Admiralty, in cases of appeal, applications, suits, or complaints in the nature of appeal, made and presented to such court respectively, or by the surrogates of the said lords commissioners in prize cases in appeals, applications, suits, or complaints in the nature of appeal, made and presented before the said lords commissioners."

And it was further ordered, "That upon any appeal, application, suit, or complaint in the nature of appeal, as aforesaid, being entered in the registry of the High Court of Admiralty and Appeals, a petition by or on behalf of the appellants shall forthwith be presented to his Majesty in council, praying that the said petition and appeal may be referred to the judicial committee of the privy council, to hear the same, and to report their opinion thereupon to his Majesty in council, and upon such reference having been made, notice thereof shall be forthwith transferred to the registry aforesaid."¹

¹ See these Orders, 2 Knapp's P. C. Cases, 20.

[*290] * On the 3d of September, 1841, the usual inhibition, citation, and monition, were decreed, to which the respondents appeared under protest on the 21st of April, 1842, and a proctor was assigned to bring in his act thereon.

Accordingly, on the 27th of April, the act on protest was brought in by the respondents' proctor, setting forth the circumstances of the seizure and condemnation of the vessel for breach of the act 5 Geo. IV. c. 113, and the clause therein limiting the time of appeal, and submitting that, inasmuch as the sentence of condemnation was a sentence of a Court of Vice-Admiralty, neither at or eastward of the Cape of Good Hope, and the inhibition served was not decreed within twelve months of the sentence; by the express words of the act, no appeal could be prosecuted therefrom.

To this the proctor on behalf of the appellants replied, admitting the seizure as set forth in the act on protest of the respondents, and the circumstances and date of the sentence of condemnation, but submitted that the inhibition was applied for twenty-six days within the period prescribed by the 29th section of the 5th of Geo. IV. c. 113, and alleged that he was prevented from obtaining a decree for the issue of the said inhibition within the time limited by the statute, by invincible necessity, and by the impossibility of being able to compel her Majesty to convene a meeting of her most honorable privy council, inasmuch as from the altered state of the law subsequent to the passing of the 5th Geo. IV. c. 113, it is now only after a reference emanating from her Majesty in council, to the judicial committee of the said privy council, that any inhibition could be decreed in any cause of appeal from any sentence of a Vice-Admiralty Court;

[*291] and he *alleged that at the time of the passing of the said statute, 5 Geo. IV. c. 113, the High Court of Admiralty was the appellate jurisdiction from all Vice-Admiralty Courts; and it was competent for any proctor exercent in the High Court of Admiralty, to attend on any day prior to the expiration of the twelve months from the date of the decree intended to be appealed from, before one of the advocates of the civil law, who are surrogates of the judge of the High Court of Admiralty, to pray the usual inhibition, which would then have been decreed and issued as of course; but that when the appellate jurisdiction of the High Court of Admiralty became transferred by 2 & 3 Will. IV. c. 91, and 3 & 4 Will. IV. c. 41, to her Majesty in council, it became essential, in the first instance, to petition her Majesty in council to refer the appeal to the judicial committee of the said privy council; and it has been and is still maintained by the registrar of the High Court of Admiralty and of the Appeals, that until such petition and appeal are referred to the judicial com-

mittee as aforesaid, no advocate has power, as surrogate of the judicial committee, or otherwise, to decree an inhibition, or to do any act in any cause of appeal so referred as aforesaid; and that it is recited in all such inhibitions, that the appeal and inhibition have been so referred; and after setting forth the particulars of his requesting the registrar to attend with him before a surrogate, in order to obtain the prohibition, and his refusal, he alleged, "that he had complied with the provisions of the said statute of 5 Geo. IV. c. 113, to the utmost of his power, and had advanced *cy-près* to an exact compliance with them, and that he was only prevented by imperious necessity, and a delay originating in the highest quarter, which he could not control, from *fulfilling them to their [*292] technical and literal extent; and he humbly submitted that even in the administration of the most unbending laws, no one is held to the fulfilment of an impossibility."

Dr. Addams and *Mr. Butt*, for the respondents,¹ relied, in support of the protest against the right of appeal, on the 29th section of the 5 Geo. IV. c. 113, and insisted that the inhibition not having been applied for and decreed within twelve months from the time when the decree or sentence of condemnation was pronounced, the appeal interposed could not be prosecuted, and must be dismissed with costs.

Mr. Burge, Q. C. and *Dr. Phillimore*, for the appellants, contended that the application for the inhibition within the time limited by the statute, though the same was not decreed, was, under the circumstances, and in consequence of the provisions of the statutes 2 & 3 Will. IV. c. 92, and 3 & 4 Will. IV. c. 41, a sufficient requisition with the terms of the 29th section of 5 Geo. IV. c. 113. They insisted, also, that neither the seisor or the crown could be heard upon the protest. They cited *Day v. Savage*,² *The City of London v. Wood*,³ *Dr. Bonham's Case*,⁴ *Muter v. Chipchase*.⁵

* LORD CAMPBELL. This cause originated in the Vice- [*293] Admiralty Court of Sierra Leone. It was a proceeding for

¹ The respondents' counsel, being for the protest, claimed and were allowed to begin, according to the practice of the Court of Admiralty. Their lordships, however, remarked that such allowance was not to be drawn into a precedent, as it was against the practice uniformly observed in this court.

² Hob. 87.

⁴ 8 Coke Rep. 107.

³ 12 Mod. 669; Plow. Com. 176.

⁵ 1 Moore's P. C. Cases, 1.

The Guiana. 4 Moore's P. C. Rep.

the condemnation of the ship *Guiana*, by reason of an alleged infraction of the Slave-Trade Act. On the 12th of August, 1840, a decree was made by that court, pronouncing that there had been such infraction, and decreeing that the ship, her tackle, apparel, and furniture were forfeited; and that certain penalties were incurred by the owners of the cargo. Against that decree there has been an appeal, which is now before us, by the owners of the ship. Information of this decree or sentence was received by the owners of the ship in the month of October, 1840, and they took no judicial step until the 16th of July, 1841, when they lodged an appeal in the Admiralty Court, and a petition under the Privy Council Act, praying that it might be referred to the judicial committee. There was no answer received to that petition until the 13th of August, one day after the year expired, the answer being dated the 11th of August, the day before it expired. On the 3d of September, 1841, an inhibition was decreed and issued; but between the 16th of July and the 11th of August there had been several applications made for the purpose of obtaining the inhibition. The question is, whether, under these circumstances, this appeal can be prosecuted.

It is contended on the part of the seizers of the ship, that the appeal cannot be prosecuted. We may at once dispose of one objection that is made on the part of the appellants, namely, that the seizers or the crown cannot be heard. Their lordships are clearly of opinion, that, according to the principle of decided cases, [*294] *the seizers have a right to be heard, and to, make any objection which the law affords them, to the appeal being prosecuted. The question, then, is, whether the claimants of the ship have a right to prosecute this appeal; and that depends upon the construction of two acts of parliament, and of certain orders in council. The first act of parliament is the 5th of Geo. IV. c. 113, s. 29, which enacts, "that no appeal shall be prosecuted from any decree or sentence of any Court of Admiralty or Vice-Admiralty, touching any of the matters provided for in this act, unless the inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced, except," &c. And so the law stood until the act was passed constituting this tribunal, the judicial committee of the privy council.

By the 2d section of the 3d & 4th William IV. c. 41, it is enacted [the learned judge here read the section.¹] So that the 5th of Geo. IV. c. 113, is to be considered as incorporated in the 3d & 4th Will. IV.

¹ *Ante*, p. 287.

c. 41. Then, according to the power vested in the privy council, there are certain orders made to regulate the mode in which appeals shall be prosecuted, whereby, in such appeals as this, it is ordered that there shall be a petition lodged in the place where the Court of Admiralty is held, and a petition to the sovereign, praying that the case may be referred to the judicial committee. Now, upon these acts of parliament, and orders, the question arises whether, there having been no inhibition decreed until the 3d of September, 1841, the appeal can be prosecuted.

It is first said that this is a case in which we have a discretion; that on account of the great hardship *arising to [*295] the parties, if that construction is to be put upon the acts of parliament, there is a discretion vested in the judicial committee, to relax the operation of this act of parliament, the 5th Geo. IV. c. 113. In this particular instance, their lordships are clearly of opinion that they have no such discretion; that they are imperatively bound, by the express words of the act; that they can only construe them; and that when they have arrived at what they consider a just construction of them, whatever the effect may be, that must take place. Indeed, it was probably with a view to take away that discretion from the court, and to obviate the numerous applications which formerly were made, that this enactment was introduced into the act, that in no case shall the appeal be prosecuted, "unless the inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced." That took away all discretion; and unless the conditions in every case to which that act applies have been performed, the court has no jurisdiction to hear the appeal.

What, then, is the true construction to be put upon this act of parliament, coupled with that which follows, the 3d & 4th of Will. IV. c. 41? Their lordships are of opinion, that unless the inhibition be both applied for and decreed within twelve months from the time when the decree and sentence was pronounced, the appeal cannot be prosecuted; and their lordships are of opinion, that this is a case to which that enactment does apply, and that the inhibition must be considered as not obtained until after the expiration of twelve months. Indeed, that is broadly admitted on the part of the appellants, because that *which is stated by their proctor, in their [*296] act on protest, is, "that he was prevented from obtaining the said inhibition within the time limited by the said statute, by invincible necessity." He admits that he was prevented from obtaining it, and he says it was by invincible necessity; but he admits that the inhibition was not decreed in this cause till the 3d of September.

Then, if it is necessary that the inhibition should be decreed on or before the 12th of August, 1841, the appeal cannot be prosecuted.

Was it, therefore, necessary that the inhibition should be procured on the 12th of August, 1841? Such is clearly the literal and grammatical construction of the words, "unless the inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced." Their lordships would have been most happy if any construction could have been put upon this act of parliament, so as to allow this appeal to be prosecuted, but they have no power to dispense with the enactment of the legislature.

As to what has been said of an act of parliament not binding if it is contrary to reason, that can receive no countenance from any court of justice whatever. A court of justice cannot set itself above the legislature. It must suppose, that what the legislature has enacted is reasonable; and all, therefore, that we can do, is to try to find out what the legislature intended. If a literal translation or construction of the words would lead to an injustice and absurdity, another construction possibly might be put upon them, but still it is a question of construction, and there is no power of dispensation from the words used.

[*297] There have been several suggestions thrown out, all *deserving great consideration, as to how we could construe this section of the act of parliament, and still admit the appeal. First, it has been suggested, that instead of "the inhibition shall be applied for and decreed within twelve months," it might be, "or decreed within twelve months;" but it seems to us, that that construction would be using an unwarrantable liberty with the language which the legislature has employed; and that, in fact, it would be putting out of the act of parliament, entirely, these words, "and decreed within twelve months," because then the same construction would be put upon that enactment as if the words only were, "if the inhibition shall be applied for within twelve months;" because they are not two separate, independent acts, one of which may take place without the other,—applying for and obtaining the inhibition, the inhibition cannot be obtained unless it is applied for; therefore, if you were to say, "or decreed within twelve months," it would be really striking out, which we have no authority to do, the words "and decreed," from the act of parliament.

Then, it has been suggested whether you might not use the words, "unless the inhibition shall be applied for and decreed," where it is possible. But the legislature has always supposed that it would be a possibility that this should be done; and we think that in putting

such a construction on the enactment, we should be interpolating words without any authority whatsoever.

It has been said, that you might refer the application of such a clause to the case where there has been a court called into existence, which might grant the inhibition; and that the year should date, not from the decree, but from the time that the court has been *called into existence, which could grant the inhibition; [*298] but then the act of parliament is, "unless the inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced." Now there is scarcely any case in which there could be a court capable of granting an inhibition immediately after the sentence had been pronounced, certainly there are many cases in which no such court could exist. With regard to what took place before the Judicial Committee Act passed, where there was an appeal from the High Court of Admiralty to the Court of Delegates, it must have been at least some days, or weeks, or months, before there could have been a petition presented to the crown for a commission of delegates, and the commission executed and accepted by those to whom it was addressed. Then, with reference to an appeal from the Vice-Admiralty Court abroad to the High Court of Admiralty in England, it must have been weeks and months, very often, before there could be an appeal brought from the Vice-Admiralty Court to this part of the world, lodged in the High Court of Admiralty in England, and then, an opportunity occurring, of applying for an inhibition, an inhibition being decreed. It seems to us, therefore, that there are no means, either of omitting words, or of adding words, that will authorize us in putting the construction upon the statute which is contended for.

Their lordships regret that the appellants should be shut out from the opportunity of having their appeal heard; but, however great that hardship may be, that cannot alter the law. It has been said, that hard cases make bad laws; and their lordships must guard against the inclinations that judges may feel, on the ground *that there may be a pressure of the law in any particular case. [*299] The courts must look at general rules, and be governed by them. It gives us less regret, however, in this case, because there was, as it seems, very considerable laches on the part of the appellants. They heard of the condemnation in the month of October, and they took no judicial step until the month of July following; and between the 16th of July and the 12th of August, if they had made the usual applications to the officers who superintend these matters, we have no doubt at all that there would have been a reference by the Queen in council to the judicial committee before the

The Guiana. 4 Moore's P. C. Rep.

year expired. It seems to us, therefore, that they themselves are to blame if there is any hardship. However that may be, their lordships are of opinion that the act of parliament has imposed a condition which has not been complied with, and that, therefore, the appeal cannot be prosecuted. It is not, however, a case for costs.¹

ON PROTEST AGAINST AN APPEAL FROM THE VICE-ADMIRALTY COURT AT SIERRA LEONE.

[* 300]

* THE GUIANA.

Manoel Francisco Lopez and others, *Appellants*; and Lieutenant Godolphin James Burslem, the Officers and Crew of Her Majesty's Ship Viper, and the Queen, *Respondents*.²

November 28, 29, 1843.

The 5th Geo. IV. c. 113, (the Slave Abolition Act,) sec. 29, enacts that no appeals shall be prosecuted from any sentence of any Court of Admiralty, or Vice-Admiralty, (except in any Vice-Admiralty Court at the Cape of Good Hope, or to the eastward thereof,) unless an inhibition be applied for and decreed within twelve months from the time of the decree or sentence being pronounced. *Held* to apply to foreigners as well as British subjects.

Protest against an appeal sustained. The appellants, (Brazilian subjects,) the owners of the cargo on board a vessel seized and condemned, under the 5th Geo. IV. c. 113, having failed to procure an inhibition to issue within twelve months from the date of the condemnation.

The British parliament have no power to legislate for foreigners out of the dominions and beyond the jurisdiction of the crown; yet it can, by statute, fix the time within which application must be made for redress to the tribunals of the empire. This being matter of procedure, becomes the law of the forum, by which all mankind are bound.

THE facts of this case, so far as the owners of the vessel Guiana were concerned, are fully detailed in the preceding case. The present appeal differed in no respect from the former, except that it was the appeal of the owners of the cargo laden on board the [* 301] vessel, * and seized and condemned therewith, who were Brazilian subjects.³

¹ See next case.

² Present: the Lord Langdale, Lord Campbell, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

³ In pursuance of the 6th & 7th Vict. chap. 38, s. 1, which enacted that appeals,

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The respondents, as in the preceding case, appeared under protest of the twenty-ninth section of 5 Geo. IV. c. 113, *the [* 302]

&c., might be heard by not less than three members of the Judicial Committee of the Privy Council, under a special order of her Majesty, the following order in council was made in this case :—

“VICTORIA R.

“Victoria, by the grace of God, of the united kingdom of Great Britain and Ireland, Queen, defender of the faith, &c. To our trusty and well-beloved James, Lord Wharncliffe, the lord president of our privy council, and to our trusty and well-beloved privy councillors, being members of the Judicial Committee of our Privy Council. Whereas, by an act passed in the present year of our reign, intituled ‘An Act to make further Regulations for facilitating the hearing of Appeals and other Matters by the Judicial Committee of the Privy Council,’ it was, amongst other things, enacted, ‘That in any appeal, application for prolongation or confirmation of letters-patent, or other matter referred, or hereafter to be referred, by her Majesty in council to the Judicial Committee of the Privy Council, it shall be lawful for her Majesty, by order in council, or special direction under her royal sign-manual, having regard to the nature of the said appeal or other matter, and in respect of the same, not requiring the presence of more than three members of the said committee, to order that the same be heard, and when so ordered it shall be lawful that the same shall be accordingly heard by not less than three of the members of the said Judicial Committee, subject to such other rules as are applicable, or, under this act, may be applicable, to the hearing and making report of appeals and other matters, by four or more of the members of the said Judicial Committee;’ now know ye, that we, reposing great trust and confidence in your knowledge and integrity, have ordered, and do by these presents order, pursuant to the powers vested in us by the said recited act, that the matter of a certain appeal from a decree of the Vice-Admiralty Court at Sierra Leone, touching the seizure and condemnation of the ship *Guiana* and her cargo, be accordingly heard by not less than three of you, being members of the Judicial Committee of our Privy Council, subject to such rules as are applicable to the hearing and making report on appeals and other matters, by four or more of the members of the Judicial Committee of our Privy Council.

“Given at our Court at Windsor, the 4th day of August, in the seventh year of our reign.

“By her Majesty’s command,

“J. GRAHAM.”

5th August, 1843.* Upon the above order in council being read,

LORD BROUGHAM observed — That it was to be distinctly understood that the late act, 6th & 7th Vict. c. 38, which was now for the first time brought into operation, is only applicable to matters of inferior importance. There must be an order in each case.

The order was, however, not acted on; the cause, as above stated, being subsequently heard by four members of the Judicial Committee.

* Present: Lord Brougham, Lord Campbell, and the Right Hon. Dr. Lushington.

appellants not having procured an inhibition to issue within twelve months after the condemnation pronounced by the Admiralty Court at Sierra Leone.

The question raised by the protest against the right to appeal, and argued, was, whether the appellants, the owners of the cargo on board *The Guiana*, being Brazilian subjects, and the vessel captured at sea, were amenable to the provisions of the statute 5 Geo. IV. c. 113. The appellants contended that they were amenable only to the treaties entered into between this country and the Brazils for the suppression of the slave-trade, and that, consequently, the Vice-Admiralty Court at Sierra Leone had no jurisdiction under the statute, to have made any decree whatever in that cause, so far as concerned the cargo; but that, if any breach of treaty had been committed, it should have been referred to the British and Brazilian

Mixed Commission Court at Sierra Leone, as the tribunal [*303] specially * appointed and provided for that purpose. The respondents submitted, that the suggested distinction between the present appeal, being that of the cargo, and the case of the brig *Guiana*, decided against in the previous appeal, was not such a distinction as to warrant any difference of judgment in the two appeals.

Mr. Thesiger, Q. C., and *Dr. Adams*, in support of the protest; and

Mr. Burge, Q. C., and *Dr. Phillimore*, for the appeal, relied upon the following authorities: *The Le Louis*; ¹ *The Hercules*; ² *The Fabius*; ³ *The Carell and Magdalena*; ⁴ *The Cazador*.⁵

LORD CAMPBELL. This is an appeal by certain persons, alleged to be Brazilian subjects, and owners of the cargo laden on board the British ship *Guiana*, against a sentence of the Vice-Admiralty Court at Sierra Leone, by which the ship was condemned as forfeited, for being engaged in the slave-trade, contrary to the provisions of the statute 5 Geo. IV. c. 113, and the shippers of the goods on board were found liable to the penalty of double the value thereof.

An objection has been made that the bail cannot be received, on the ground that the condition imposed by the twenty-ninth section

¹ 2 Dodson, 210.

³ 2 Rob. Adm. 245.

⁵ 2 Moore's P. C. Cases, 15.

² 2 Dodson, 353.

⁴ 3 Rob. Adm. 58.

of that act, respecting the prosecution of appeals, has not been complied with; and * the only question now to be [* 304] decided is, whether the appeal can be received.

I need not say that their lordships must lean strongly against any such objection, and that it would be particularly satisfactory to them that the appellants should be heard against the sentence in this case, as they are said to be foreigners. But we can only, to the best of our ability, put a construction on the statute by which our jurisdiction is regulated; and if it appears to us that this statute forbids us to receive the appeal, we are bound, however reluctantly, to dismiss it.

The statute 5 Geo. IV. c. 113, was passed to consolidate the acts relating to the abolition of the slave-trade; and the twenty-ninth section enacts, that "no appeals shall be prosecuted from any decree or sentence of any Court of Admiralty or Vice-Admiralty, touching any of the matters provided for in this act, unless the inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced, except where such decree or sentence shall be passed in any Vice-Admiralty Court at the Cape of Good Hope, or to the eastward thereof, in which case eighteen months shall be allowed for the prosecution of the said appeal."

In this case the sentence was pronounced by the Vice-Admiralty Court at Sierra Leone, on the 17th of August, 1840, and the inhibition was not decreed till the 3d of September, 1841.

Their lordships have already decided that, for this reason, the owners of the ship were not entitled to prosecute their appeal. The counsel for the owners of the cargo have attempted to distinguish their case from * that of the owners of the ship, on [* 305] several grounds; but I regret to say that their lordships, after great deliberation, think that the cases are not distinguishable, and that the former decision (to which they adhere) must govern the present.

In the first place, it is contended that the owners of the cargo are not bound by the enactment, because they are foreigners. The British parliament certainly has no general power to legislate for foreigners, out of the dominions and beyond the jurisdiction of the British crown, but it cannot be doubted for a moment that a British statute may fix a time within which application must be made for redress to the tribunals of the empire. This is matter of procedure, and becomes the law of the forum. On matter of procedure, all mankind, whether aliens or liege subjects, plaintiffs or defendants, appellants or respondents, are bound by the law of the forum. If a law were

made upon this subject, working oppression and injustice to the subjects of a foreign state, that state might make representations and remonstrances against this law to our government; but, while it remains in force, judges have no choice but to give it effect. Had it been shown to us ever so clearly, that in this case the condition required could not have been complied with, if it has clearly, absolutely, and universally been imposed, we should have no power to dispense with it. At the same time, it is a great consolation to us to consider, that the enactment in question leaves ample time for the effectual prosecution of such an appeal; and that it may be well defended on the principles on which there are laws of prescription in all civilized countries, fixing the time within which suits shall be commenced, or appeals prosecuted. In the present case,

[* 306] nothing * has been said of the circumstances which led to the delay in decreeing the inhibition; but in the former case it appeared that the delay mainly arose from the laches of the agents of the appellants, in not sooner taking the proper steps for obtaining it.

The appellants, as owners of the goods, must rely upon a part of the sentence, by which it is declared that the goods shall be held in deposit till the penalty is paid. This, they contend, is contrary to the act of parliament, therefore not provided for in the act; and, therefore, they say it entirely takes the case out of the operation of the twenty-ninth section. But the question at present is, not whether the sentence is justified by the act, but whether it touches any of the matters provided for in the act. Now, the fourth section of the act provides, that a ship employed in the slave-trade shall be forfeited; and the seventh section provides, that the shippers of goods to be employed in the slave-trade shall forfeit double the value. The sentence below finds that The Guiana, at the time of her seizure, was employed in the slave-trade, contrary to the provisions of the 5th Geo. IV. c. 113, and condemns her as forfeited; and pronounces that the shippers of the goods on board are liable to the penalty of double the value of the said goods, as the penalty due by law; and that the goods shall be held in deposit till the penalty is paid. Whether this sentence be or be not according to the act, are the appellants justified in saying that it is not a sentence touching any of the matters provided for in the act? The judge of the Vice-Admiralty Court may be mistaken in supposing that a lien could be claimed on the goods for the penalty; but can it be successfully contended that the remedy for the penalty on the goods, in

[* 307] respect of * which the penalty was incurred, was not a matter touching the penalty and the goods? Are we to have

a previous argument, as to whether this part of the sentence ought to be reversed, before we decide whether the appeal can be heard? The construction of the clause of limitation, contended for by the appellant, would render it perfectly nugatory; for in every case it might be contended that the clause does not apply, if the sentence be erroneous; and the sufficiency of the sentence would be argued and determined on the protest against receiving the appeal. If, indeed, the sentence contained a separate and distinct matter, not touching any of the provisions of the act, although it did contain other matter touching those provisions, we think the clause would not apply to the sentence, so far as the former matter is concerned, and that, *pro tanto*, the appeal might be received, although the condition about the decreeing of the inhibition had not been complied with; but we cannot consider that the holding of the goods in deposit, for the penalty, is any such separate and distinct matter, and we make no doubt that it touches the penalty which the act imposes. If this part of the sentence is utterly void, as contended for, the goods cannot be lawfully detained for the penalty; and the question may, perhaps, be tried in an action of trover, or for money had and received. Their lordships think that it cannot be tried on this appeal, either alleged as a substantive ground for reversing the sentence, or as a ground for receiving the appeal. We know by experience, in this place, that the sentences of the Vice-Admiralty Courts are often very informal; and it would be most perilous to captors and seizers if such informalities might be taken advantage * of, by appeal, at any distance of time. It was, probably, [*308] to guard against this that the legislature has anxiously made the limitation, as to the time of appealing, to apply in language so comprehensive to all sentences touching any of the matters provided for by the act; and we are of opinion that we should by no means be justified in putting a construction upon it which would entirely defeat its object.

It was further argued, that the Vice-Admiralty Court at Sierra Leone had no jurisdiction in this case, and that we ought, therefore, to reverse the appeal; and, indeed, it was said we ought at once to reverse the sentence, or to declare it null. I did not exactly understand how we were to come to the conclusion that the Vice-Admiralty Court had no jurisdiction over this British ship, for an infraction of the British statute, or how the case could have been brought before the Mixed British and Brazilian Commission. But the appellants do not deny that there are supposable facts, which would give the Vice-Admiralty Court at Sierra Leone jurisdiction over the whole case; and, till the appeal is received and heard, how can we know

that these facts did not actually exist, and were not the foundation of the sentence? But suppose that a total want of jurisdiction were established, the clause of limitation is not applied to sentences of courts acting within their jurisdiction; and this sentence, if it were pronounced by a court not having jurisdiction, would not the less be the sentence of a Vice-Admiralty Court, touching matters provided for by the Slave-Trade Abolition Act.

A number of cases were cited to us, showing what that [* 309] great judge, Lord Stowell, had said and done, * when he had to review sentences of Vice-Admiralty Courts, bad for want of jurisdiction; but all these cases were regularly before him, upon an appeal duly brought and prosecuted; and in none of them did the question arise which we have to decide, whether the appeal ought to be admitted upon the construction of an act of parliament for limiting the time for appealing. I apprehend, therefore, that, in this stage of the proceedings, the argument arising from a supposed want of jurisdiction in the Superior Court must be quite unavailing.

In the pardonable excess of a very laudable zeal, a power was imputed to this court which the learned counsel for the appellants, on reflection, must be aware does not belong to us. It was said that, as a supreme tribunal, acting on the law of nations, we were to remedy all the grievances of foreigners, arising from the acts of colonial courts, which may in any shape be brought before us. But, in reality, we are now sitting merely as a Court of Appeal from a Vice-Admiralty Court, strictly bound by acts of parliament, as much as the lowest court of justice in the kingdom. We cannot reverse or alter a sentence till it is regularly before us on appeal; and we cannot receive an appeal, if, as in the present case, a previous condition prescribed by the legislature has not been complied with.

I, for one, should have been well pleased if an attempt which was made in the last session of parliament, to allow this appeal to be heard, by altering the law for these particular appellants, had succeeded. A clause in a bill for this purpose passed one [* 310] house of the legislature without opposition, but * was not approved by the other; ¹ on the ground, as I was informed,

¹ After the decision in the appeal of *Logan v. Burslem*, (*ante*, p. 284,) a bill, intitled "An Act to make further Regulations for facilitating and hearing Appeals and other Matters, by the Judicial Committee of the Privy Council," was brought in the House of Lords. By section eleven of this bill it was enacted, "That in all cases wherein a petition shall have been heretofore lodged, as aforesaid, but the usual inhibition and citation shall not have been decreed within the aforesaid respective periods,

The Friends. 4 Moore's P. C. Rep.

that, on inquiry, it was found that, if the agents employed had done their duty, the inhibition might easily have been obtained in due time. But however that may be, the general law stands unaltered; and, upon the just construction of that law, their lordships are of opinion that the appeal cannot be received. They will, therefore, humbly recommend to her Majesty in council that the appeal should be dismissed, as prayed by the respondents.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY
OF ENGLAND.

* THE FRIENDS.

[* 314]

The General Steam Navigation Company, *Appellants*, and William Meddling Tonkin, *Respondent*.¹

February 6, 1844.

In cases of collision, the rule of the Trinity House, that "where steam-vessels, on different courses, must unavoidably cross so near, that by continuing their respective courses there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other," is applicable only when the vessels, by continuing their respective courses, are likely to come into collision, and when, by putting their helms to port, the collision may be avoided: but the rule is not applicable when either

the Judicial Committee and their surrogates shall have full power to proceed, and the said Judicial Committee shall report, and her Majesty shall adjudge on such report, in like manner and as if the said inhibition and citation had been decreed within the aforesaid respective periods, notwithstanding any protest entered into or determined upon by the said Judicial Committee."

When the bill was sent down to the House of Commons, a select committee was appointed by that house, "to inquire into the facts attending the delay in extracting the inhibition in the case of the ship *Guiana*, and dismissal of the appeal, in the said case, by the Judicial Committee of the Privy Council." The select committee, after examining witnesses, reported to the house that there did not appear sufficient grounds to sustain the above section, (which had been imported into the bill to meet the exigency in the case of *The Guiana*.) The section was accordingly struck out of the bill.*

Present: Lord Brougham, Lord Campbell, Sir Herbert Jenner Fust, and the Right Honorable T. Pemberton Leigh.

* See the 6th and 7th Vict. c. 38.

The Friends. 4 Moore's P. C. Rep.

vessel, by unskilful management, is so near the shore, that by porting her helm there would be danger of collision : in such case, the vessel on her right course is justified, in spite of the rule, in putting her helm to starboard.

THIS was an appeal from the sentence pronounced by the judge of the High Court of Admiralty, in a cause of damage brought by the appellants, as the owners of the steam-ship *Menai*, against the schooner *Friends*, and the respondent, as the sole owner of that vessel.

The facts of the case, as pleaded in the act on petition, were in substance as follows :—That about 7 P. M. of the 27th of October, the steam-vessel was proceeding up Half-way Reach, and was just below the half-way house between Gravesend and London, being at the time on the Kentish side of the river, and distant therefrom [*315] *about one third of the width of the river, the night being dark, and the ebb-tide running, with the wind blowing strong from the west. That at such time the schooner *Friends* was observed coming down the river, just open on the starboard bow of the steamer, and distant therefrom about a quarter of a mile, which was as far as a vessel having no light hoisted could have been seen in the darkness of the night. That the steamer had a good look-out, and had lights hoisted, one very large, with two burners, at the mast-head, which could be seen at the distance of a mile, at least, and the other, which was a smaller light, under the ship's head. That upon perceiving the schooner, the helm of the steamer was immediately put to starboard, and the schooner still continuing to bear down upon the steamer, was still kept a-starboard, for the purpose of bringing the steamer as near the shore as possible, and thereby avoiding a collision. That, upon the schooner coming within hail, the pilot of the steamer hailed the crew of the schooner to put her helm up, but this direction was not complied with, and the engines of the steamer were thereupon stopped, and, in consequence of her helm being a-starboard, the steamer was so near the shore that she went aground. That the helm of the steamer was then ported, but that, in consequence of the steamer having taken the ground, it had no effect, and the schooner struck the steamer amidship, abaft the starboard paddle-box, causing the damage in question.

The owners of the schooner pleaded, — That the wind was west and by south, and the night starlight, and that the schooner was at the time proceeding down the river, in ballast, for Erith. That she was under her foresail, topsail, top-gallant-sail, fore-topmast [*316] *stay-sail, and main-sail, and with all her hands on deck, keeping a good look-out; her course was southward of the mid-channel, the tide having recently turned, and running down.

That, when the lights of the steamer were first perceived, from her position, they showed that the steamer's head was inclined to the northward. That, as the steamer rounded the point above half-way house, she opened upon the schooner's larboard bow, the vessels being then at the distance of about a quarter of a mile from each other. That the schooner's course was thereupon slightly altered, by steering her more towards the south shore ; and upon rounding the point, the steamer's course, which had before been on the northward, was suddenly altered, by putting the helm a-starboard, upon which the helm of the schooner was put still more a-port, so that she approached within a very short distance of the south shore, her course having previously been between the south shore and the mid-channel. That the steamer was repeatedly hailed to port her helm, and some person on board the steamer called out to the schooner, in reply, to starboard her helm. That, in order to lighten the force of the collision, but when the respective vessels were too near to avoid a collision, the helm of the schooner was put a-starboard, and the peak halyards and the main sheet were let go, and immediately afterwards the steamer ran into the schooner, the funnel-chain of the former catching the bowsprit of the latter, carrying away the schooner's cutwater and apron, and doing her considerable damage. The schooner, in porting her helm and steering towards the south shore, acted in compliance with the instructions of the elder brethren of the Trinity House, that when there is a risk of a collision, * vessels should pass [* 317] each other on the larboard side, and that the accident was solely and entirely occasioned by the fault and misconduct of the persons on board the steamer.

Evidence was entered into on both sides : that on behalf of the General Steam Navigation Company consisted of the affidavit of the commander, the pilot, and engineer on board *The Menai* at the time of the collision, a surveyor, the Trinity pilot, and harbor-master of the port of London ; and on the part of the schooner, the affidavit of the mate, two watermen on board, the owner, and a passenger.

The case was heard before the learned judge of the Admiralty Court, assisted by two Trinity Masters, when the court pronounced against the claim, and on behalf of the steamer, and dismissed the owner of the schooner with costs.¹

From this decree the present appeal was brought.

Mr. Thesiger, Q. C., and Dr. Addams, for the appellants. *The*

¹ Reported, 1 Rob. 478.

question depends upon the weight to be given to the rule of the Trinity House,—whether that is to govern the case, or what is pleaded and proved by the evidence to be the practice, of vessels running against tide. The rule is not inflexible,—it must bend to circumstances. Here the course pursued by the steamer was fully justified, and so a jury in an action at common law by their verdict found. The schooner might have avoided the collision. The rule of law respecting negligence is, that although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences *of the defendant's negligence, he is entitled to recover. *Davis v. Mann*.¹ Neither can an action be maintained where the accident is the result of fault on both sides. *Butterfield v. Forrester*;² *Bridge v. The Grand Junction Railway Company*.³ Assuming, therefore, that the appellants were wrong, yet, upon the principle laid down by the above authorities, the court should not have decreed against them, as it is apparent, that the collision might have been avoided by the schooner if those in charge of her had used due caution. In cases of collision, a difference exists between common-law courts and the admiralty. In the former, if both parties are to blame there are no damages. In the latter, the loss is divided between the parties according to the negligence.

The *Queen's Advocate* (Sir John Dodson) and *Mr. Platt, Q. C.*, for the respondent. If the custom, as pleaded by the appellant, be not invariable, there is no usage at all. But this very rule of the Trinity House now sought to be avoided, has been sustained, and effect given to it. The *Duke of Sussex*.⁴ There the court held that the rule of navigation with regard to steam-vessels approaching each other at different courses, that each vessel should put her helm to port, so as always to pass on the larboard side of each other, was a rule of binding authority, and condemned a steamer for damages occasioned by neglecting this rule. This case is conclusive. There was an obligation on the steamer to have ported her helm, and have prevented the collision. No exception *can prevail to the rules laid down by the Trinity House. They are imperative. The cases cited as to the rule of the road, do not, therefore apply. Courts of Admiralty are governed by the same rules of evidence as at common law. The only difference is the mode of awarding damages, which, in the present case, is immaterial.

¹ 10 Mee. & Wel. 546.³ 3 Mee. & Wel. 244.² 11 East, 60.⁴ 1 Rob. Adm. 274.

February 8, 1844. LORD CAMPBELL. This is an appeal from the sentence pronounced by the judge of the High Court of Admiralty, in a cause of damage brought by the appellants, as owners of the steam-ship *Menai*, against the schooner *Friends*, and the respondent, as the sole owner of that vessel.

After act on petition, reply, and rejoinder, and the examination of various witnesses on both sides, the case came on to be heard, the judge of the Admiralty Court being assisted by two masters of the Trinity House.

The learned judge having summed up the evidence, asked their opinion as to the conduct of the two vessels in point of seamanship when the collision happened; and they stated their opinion to be, "that the steamer was to blame, and that the other vessel conducted herself properly according to the rules of navigation," and thereupon he pronounced judgment against the claim on behalf of the steamer, and to dismiss the owner of the other vessel with his costs.

The case turned chiefly upon a rule of the Trinity House, bearing date 30th of October, 1840, that, "when steam-vessels on different courses must unavoidably or unnecessarily cross so near, that, by continuing their respective courses, there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other. * A steam-vessel [*320] passing another in a narrow channel must always leave the vessel she is passing on the larboard hand."

In the evening of the 27th of October, 1842, after it was dark, The *Menai* steamer, on a voyage from Ostend to London, was coming up the River Thames against wind and tide, and the schooner *Friends* was coming down the river with the wind and tide in her favor. They approached each other near the point which separates Barking Reach from Half-way Reach. The schooner put her helm to port, but the steamer put her helm to starboard. The consequence was, that a collision took place between them.

The appellants insist that, circumstanced as the two vessels were when they came in sight of each other, the rule was not applicable, and that observing it would have increased the danger. They argue, therefore, that it was not binding on this occasion; and their lordships would be of this opinion, if they thought the fair result of the evidence to be that which is contended for by the appellants. If the schooner was hugging the Kentish shore, leaving the steamer on the starboard bow, they might have passed each other without changing their course; and if the steamer was in that position, and the schooner by unskillful management was so near the Kentish shore, that if each vessel had put her helm to port, there would have been great danger

of collision, in spite of the rule, the steamer would have been justified in putting her helm to starboard, and the schooner would be liable for the damage that ensued, although at last she observed the rule; for the rule can only be applicable where the vessels, by continuing their respective courses, are likely to come into collision, and [*321] where, *by putting their helm to port, the collision may probably be avoided.

But there is strong evidence to show, that when the two vessels came in sight of each other, the steamer was nearer the north side of the river; that if she had not starboarded her helm, the two vessels would have passed each other on the larboard side, and, at any rate, that if they were to change their course from the risk of collision, there was nothing to have prevented the steamer from putting her helm to port, so as certainly to have kept them clear of each other. The learned counsel for the appellants admitted at the bar, that if the evidence for the respondent was to be believed, the negligence was to be imputed to the steamer, and not to the schooner. That evidence was submitted to the elder brethren of the Trinity House, and their lordships are not prepared to say that the conclusions which they draw from it is erroneous. Always entertaining great respect for such an opinion, we should by no means consider ourselves bound by it, though approved of by the judge of the Admiralty Court, if we thought it erroneous; but in this case, looking to the situation of the witnesses, and the statements they make, we should have arrived at the same conclusion. It is not alleged that any erroneous principle of law has been laid down; and the case depends upon the credit to be given to the witnesses.

It was suggested at the bar, and not denied, that an action had been brought in the Court of Exchequer by the owner of the schooner, against the owners of the steamer, in respect of this very collision, when there was a verdict for the defendants. Without at all questioning the propriety of that verdict, according to the evidence laid before the jury, their lordships *can only consider whether this decision is not authorized by the evidence in the Court of Admiralty. It is not stated that, on the trial of that case, any direction in point of law was given, inconsistent with the judgment now appealed against. I apprehend that the principles on which such cases are determined, in the courts of common law and in the Court of Admiralty, are precisely the same, and I entirely concur in the cases that have been cited on the part of the appellants, *Butterfield v. Forrester*, *Bridge v. The Grand Junction Railway Company*, and *Davis v. Mann*. The Court of Admiralty has the great advantage, where both parties have been to blame, of being able to

The Augusta. 4 Moore's P. C. Rep.

apportion the loss, according to their respective degrees of culpability; but in a case like the present, upon the same facts, ought to pronounce exactly the same judgment as a court of common law.

Their lordships will, therefore, recommend to her Majesty, that the judgment appealed against should be affirmed, with costs.



ON APPEAL FROM THE VICE-ADMIRALTY COURT AT SIERRA LEONE.

* THE AUGUSTA.

[* 369]

Thomas Jennings, *Appellant*, and Henry Worsley Hill, *Respondent*.¹

February 20, 1844.

A party attached for non-payment of costs decreed against him in an appeal under the Slave-Trade Act, in which the crown and the captors were the respondents; upon supersedeas by the crown, ordered to be discharged out of custody: notwithstanding the captors' objection to the crown receiving costs out of the proceeds of the sale of the vessel condemned. By the 44th section of the 5th Geo. IV. c. 113, the captors of a vessel employed contrary to the provisions of the act, are only entitled to a moiety of the proceeds of the sale thereof, after deducting the costs of prosecution.

THIS was a motion to relax and supersede an attachment issued against Thomas Jennings, the appellant, for not obeying a monition for payment of costs decreed on appeal under the following circumstances:

The appeal was from a sentence of the Vice-Admiralty Court at Sierra Leone, condemning the vessel, (The Augusta,) her tackle, &c., upon a charge of aiding and abetting the slave-trade, contrary to the 5th Geo. IV. c. 113. The appeal was heard before their lordships² on the 5th of April, 1843, when the sentence of the court below was affirmed, and the appellant, Jennings, condemned in costs of the appeal.³

¹ Present: Lord Campbell, Sir Herbert Jenner Fust, the Right Honorable Dr. Lushington, and the Right Honorable T. Pemberton Leigh.

² Present: The Lord President, (Lord Wharncliffe,) Lord Brougham, Lord Campbell, and the Right Honorable Dr. Lushington.

³ The judgment rested entirely on the facts and evidence in the cause, and contained no new principle of law as applicable to such cases.

The Augusta. 4 Moore's P. C. Rep.

[* 370] * On the 7th of July, 1843, a monition issued against Jennings for payment of these costs. The monition was served personally, and, on the 7th of December, having been returned, and the appellant certified in contempt for not having obeyed it, an attachment was issued against him. Under this attachment, Jennings was taken into custody and lodged in the Queen's Bench Prison. On the 18th of January, 1844, the costs of the crown were directed to be paid out of the proceeds remaining in the registry; and on the same day one moiety of the net proceeds, after deducting the costs of the crown, was directed to be paid to the respondent, the captor, pursuant to the 44th section of the 5th Geo. IV. c. 113.

On the 8th of February, Nicholl, her Majesty's procurator-general, in pursuance of the directions of the lords commissioners of her Majesty's treasury, alleged before the surrogate, that he would proceed no further under the attachment decreed against the said Jennings, and consented to the same being superseded. The proctor for the respondents, the captors, refused to attend the surrogate, whereupon the matter was referred to the judicial committee.

Dr. Addams now moved to discharge Captain Jennings from the attachment.

The *Queen's Advocate*, (Sir John Dodson,) for the crown, offered no opposition; but

Dr. H. J. Nicholl, for the respondent and others, the cap-
[* 371] tors, opposed the motion, contending that by the 44th * section¹ of the 5th Geo. IV. c. 113, one moiety of the proceeds

¹ This section is in the following terms: "And be it further enacted, That the proceeds of all ships and goods seized, prosecuted, and condemned, for any offence against this act, except in such seizures as shall be made at sea by the commanders or officers of her Majesty's ships or vessels of war, shall be divided, paid, and applied as follows: that is to say, after deducting the charges of prosecution from the gross amount thereof, one third of the net proceeds shall be paid into the hands of such person as his Majesty, his heirs and successors, may please to appoint, for the use of his Majesty, his heirs and successors; one third part thereof to the governor or commander-in-chief of the island, colony, plantation, settlement, or territory, where the said seizure shall have been made or prosecuted; and the other third part thereof to the person or persons who shall lawfully seize, inform, and prosecute the same to condemnation. And in case of seizures made at sea by the commanders or officers of his Majesty's ships or vessels of war, one moiety of the said net proceeds, after deducting the charges of prosecution as aforesaid, shall be paid into the hands of such person as his Majesty, his heirs and successors, may please to appoint, for the use of his Majesty, his heirs and successors; and the other moiety to the commanders or officers of his Majesty's ships

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of the condemned vessel vested in the captors at the time of the seizure, and that if the crown was entitled to deduct the costs out of the proceeds, it would defeat the object of the act. The sum might, perhaps, be paid by the crown, upon a petition of right.

LORD CAMPBELL. In this case their lordships are of opinion that the warrant of arrest should be superseded, and that Captain *Jennings is entitled to be discharged. Captain Jennings [*372] has been arrested for costs decreed to the crown on an appeal in this matter in which the crown is prosecutor. Their lordships are of opinion, that the crown has a right to supersede the process which issued at its own instance. Their lordships are of opinion, that the crown must be supposed to have done what is necessary to satisfy itself that the process should be superseded. We find it thus stated in the proceedings in the cause: "Nicholl, her Majesty's procurator-general, in pursuance of the directions of the lords commissioners of her Majesty's treasury, alleged that he should proceed no further under the attachment decreed against the said Thomas Jennings, and consented to the same being superseded." Therefore, on this minute, it is clear that the crown has consented to the warrant being superseded; are we to interfere, and say there is no power in the crown to grant a supersedeas? We apprehend that there is no discretion vested in us to advise the crown either to supersede the warrant, or to allow it to remain in full force; that is a matter between Captain Jennings and the crown. Even if the crown had acted improperly towards the captors, the parties before us are only Captain Jennings and the crown, and we cannot interpose to prevent Captain Jennings having the benefit the crown intends him to have. It has been said in argument, that Lieutenant Hill and the captors have a vested interest in the proceeds; and so they have, but it is in the net proceeds, after deducting the charges of the prosecution: and it is not until those charges have been deducted, that the net proceeds are ascertained.

Their lordships must not be understood to say, that there *is no remedy against the crown. Dr. Nicholl referred to a [*373] proceeding by a petition of right on behalf of the captors;

or vessels of war who shall have made the seizure and prosecuted the same to condemnation, subject, nevertheless, to such distribution in the seizures made by the commanders or officers of his Majesty's ships or vessels of war, whether at sea or otherwise, as his Majesty, his heirs and successors, shall think fit to order and direct by any order or orders in council, or by any proclamation or proclamations to be made for that purpose."

but their lordships, looking to this section of the act of parliament, and finding the words are, "after deducting the charges of prosecution," that the net proceeds are to be the net proceeds after deducting the charges of prosecution,—finding this enactment, their lordships apprehend that Lieutenant Hill has no cause of complaint,—that the crown has a discretion to do what is proper. It is the crown who issued the monition, and had Captain Jennings arrested, and if the crown thinks proper to consent to Captain Jennings being discharged, we conceive that it is not exceeding the just power belonging to the crown.

Therefore, Captain Jennings ought to be discharged. We think the captors have no reason to complain, if they have one half of the net proceeds after these charges are paid.

CASES

SELECTED FROM VOLUME VI.

OF

MOORE'S PRIVY COUNCIL REPORTS.

[THE CASES SELECTED ARE THOSE IN ADMIRALTY.]

1846 - 49.

C A S E S
HEARD AND DETERMINED BY THE
J U D I C I A L C O M M I T T E E
AND THE
LORDS OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

* THE SARACEN.

[* 56]

Ami Bernard and others, *Appellants*; Samuel Hyne and Francis Casey, *Respondents*.¹

February 15 and 16, 1847.

Although in the decision of cases properly within the jurisdiction of the Court of Admiralty, equitable considerations ought to have weight, yet that court has not jurisdiction to do all that a Court of Equity might do, in suits instituted by persons suing either for themselves, or on behalf of themselves and others, for administration of assets or distribution of a common fund.

Where, therefore, the owners of a vessel and part of the cargo, lost in a collision, brought an action in the Admiralty Court against the damaging vessel, and obtained a decree for the condemnation of the ship, referring the amount of damages to the registrar and merchants, who were to report them; and, on the same day that the decree was pronounced, the owners of the remaining portion of the cargo brought an action against the damaging vessel, and applied to the court to be let in to participate ratably in the proceeds of the condemned ship remaining in the registry; it was *held* —

First. That the Admiralty Court, in such circumstances, had no jurisdiction to decree a ratable distribution, and thereby take away the priority of the *prior potens*; and,

Secondly. That the decree for damage and reference to the registrar and merchants was a definitive sentence.

The statute 53 Geo. III. c. 159, was passed for the protection of owners of ships, and applies only to bills in equity, and suits or proceedings instituted by or on behalf of owners, and does not give equitable jurisdiction to the Court of Admiralty in a case where a proceeding is not taken under the statute by the owners of the ship.

¹ Present: Lord Brougham, Lord Langdale, Lord Campbell, Right Hon. Sir H. Jenner Fust, and the Right Hon. T. Pemberton Leigh.

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Semble. That the fifteenth section of statute 53 Geo. III. c. 159, may be applicable to suits for damage in the Admiralty Court, if accompanied by a proceeding on the part of the owners, for their own protection, and may lead to a distribution *pro rata* of the proceeds of the ship among the claimants.

THIS was originally a cause of damage, civil and maritime, [* 57] time, in the High Court of Admiralty of England, * promoted by Samuel Hyne, the owner of the late vessel *Diligent*, and Francis Casey, owner of part of the cargo laden on board the same, against the ship *Saracen*, her tackle, apparel, and furniture, and the freight due for the transportation of the cargo laden therein; against Messrs. Dimmock, Albra & Bartlett, all of Boston, in the United States of America, the owners thereof, intervening in the cause. The cause arose from a collision at sea, between *The Saracen* and *Diligent*, occurring in the night of the 11th of February, 1845, in consequence of which *The Diligent*, with the whole of her cargo on board, was entirely lost.

On the 25th of February, 1845, an action was entered and a warrant issued to arrest the ship *Saracen*, her tackle, apparel, and furniture, and the freight due for the transportation of the cargo then or then lately laden on board the same, and cited all persons having any right or interest therein to appear on the default day after Hilary Term, the 19th of March then next ensuing, to answer to Samuel Hyne, the owner of *The Diligent*, and also to Francis Casey, owner of part of the cargo lately laden on board the same, in a cause of damage, civil and maritime.

An appearance to the action was entered for the owners of *The Saracen*, and the warrant to arrest the ship having been duly executed, but no bail being given, the vessel continued under arrest.

On the 12th of March another action was entered against *The Saracen*, on behalf of two of the appellants, owners of part of the cargo then lately laden on board *The Diligent*, in a cause of damages, &c., the action being for 1,500*l.* No further proceedings were had in this action.

The act on petition in the original suit brought by the [* 58] * respondents, and the answer thereto, having been brought in, and the usual proceedings had on both sides, the judge of the Admiralty Court, on the 6th of May, 1845, assisted by two Trinity Masters, by an interlocutory decree pronounced for the damage proceeded for in the original cause, and condemned the ship *Saracen* and freight therein, and in costs; and referred the damage, together with all accounts and vouchers brought in, or thereafter to be brought in, relative thereto, to the registrar and merchants, to report the amount thereof; and also condemned the owners thereof

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in costs, and decreed a commission of appraisement and sale of the ship, her tackle, apparel, and furniture.

On the same day that the interlocutory decree was pronounced, a fresh action was entered, and a warrant issued to arrest the ship *Saracen*, on behalf of the appellants, the damages being laid at 2,500*l*. No appearance was entered on behalf of the owners (the respondents) of *The Diligent* to this action. On the 24th of June, the commission of sale, with the amount thereof, was duly returned, and the sum of 1,037*l*. 15*s*. 6*d*., as the net proceeds of the sale, brought into the registry of the court.

On the 4th of November, the respondents' proctor prayed the judge to decree the proceeds of sale of the ship, remaining in the registry of the court, to be paid out to the respondents. But an appearance being made by the appellant's proctor, for the owners of part of the cargo laden on board the schooner *Diligent*, it was prayed that they might be heard on this, in objection to the prayer of the respondents. The judge assigned their proctor to bring in their act on petition at next court.

* On the 14th of November, an act on petition was [* 59.] brought in on behalf of the appellants, which, after stating the original action, and the proceeding thereon against the ship *Saracen*, and also the action brought by the appellants, proceeded to allege that the appellants' proctor distinctly ascertained from the respondents' proctor that no appearance would be given on behalf of the owners of *The Saracen*, to any action entered by him on behalf of any owners of the lost cargo, and that no bail would be given for the ship *Saracen*, then already under arrest at the suit of the respondents; that it was then considered by him, and admitted, that the interest of both parties was identical and equal, and that, under that impression, he retained, on behalf of his parties, the counsel who was already acting for the other side; that it was then well known to all parties that the value of the ship *Saracen* was not nearly sufficient to cover the amount of damage sustained by either of the said parties separately; that, in consideration of what was thus alleged, and for the purpose of saving expense, and thereby of serving the interest of all the parties damnified by the aforesaid collision, he, with the knowledge and consent of the other party and his counsel, postponed arresting the ship *Saracen*, and taking the other necessary steps towards getting a decree of the court, pronouncing for the damage sustained by his parties, until the 6th day of May last, when a fresh action was entered by him on behalf of the appellants, and, by virtue of a warrant from the court, the ship *Saracen* was arrested, and kept under arrest until she was sold, as aforesaid;

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and no appearance having been given to such action, the
[* 60] usual *defaults have been duly granted. He further alleged that, having been instructed to take the necessary steps to establish the claims of certain other parties, owners of portions of the cargo, against The Saracen, or the proceeds of the sale thereof, he, some time in the month of June last, with the view of still further saving expense, and also of saving the great delay which would otherwise necessarily occur in getting the proceeds of the sale paid out of the registry, proposed that an arrangement should be made out of court, whereby the proceeds might be paid out, for the purpose of being placed in the hands of some third party, and divided amongst all the owners of the schooner and her cargo, in proportion to the damage sustained by each of them respectively; that such proposal was agreed to, and was in the progress of being carried into effect, by obtaining the necessary signatures to an agreement drawn up with that view, when the claim now advanced, on behalf of the respondents, for priority of payment out of the proceeds, was first made. And he lastly alleged, that neither he nor his parties, nor either of them, had, at any time, relinquished their claim for compensation, or their right of establishing the same against The Saracen; that they had not, nor had either of them, received any compensation whatever for the loss sustained by them, and that grievous injury and injustice would be sustained by them, unless they should be allowed to participate ratably with the other parties in the proceeds; that, by reason of his conduct in the premises, the fund now in court had been saved from great and unnecessary diminution. He therefore submitted that, by reason of the pre-

[* 61] mises, his *claim for participation on behalf of his several parties had been well and duly made, and he was entitled to a decree of participation in the proceeds remaining in the registry of the court, and to the costs of that petition. And he prayed the judge to reject the prayer for payment of the proceeds to the respondents, and to pronounce that his parties, the owners of parts of the cargo on board The Diligent, when so sunk, were entitled to participate ratably with the respondents in the proceeds of the ship, on proof being made by them of their ownership, as alleged, and other necessary proceedings being first duly had and taken, and to condemn them in the costs of that petition.

In reply, the respondents' proctor alleged that, in virtue of the action entered by him on the 25th of February last, against the ship Saracen, and the freight due for the transportation of the cargo on board the same, (and which action was entered in the sum of 4,000*l.*.) the usual warrant of arrest issued under seal of this court, and, on

the 26th of the same month, was duly executed on board the ship, at Liverpool; at which time her cargo had been discharged, the freight had been paid to the master, and the ship was in the act of taking in ballast, and would, but for the arrest, have cleared outward, and sailed on her voyage home to America. And he further alleged, that no action was entered against the ship, on behalf of the appellants, until the 12th day of March following, (and was then entered by him on behalf of two only of the present parties, and in the sum of 1,600*l.* only,) and was entered only, and not in any manner prosecuted or proceeded in. And he further alleged, that the proctor * of the owners of the ship Saracen, (and who duly [* 62] appeared to the action by him entered, as aforesaid,) declined to give the usual bail for the release of the ship, but prayed an act on petition, which he was assigned to bring in, and afterwards brought in, and which was replied to by the proctor of the owners of the ship, and concluded, when Samuel Hyne, the owner of The Diligent, and Francis Casey, the owner of part of the cargo on board the same, his parties, having, at considerable trouble and expense, procured the evidence of the master and crew of the schooner in support thereof, the cause came on to be heard on the third session of Easter Term last, to wit, on the 6th day of May, when the right honorable the judge was pleased to pronounce for his prayer, and to condemn the ship Saracen and the freight in the damage proceeded for, with costs, and to decree the usual commission for the appraisement and sale of the ship. And he further alleged that, on the same day, but not until after the court had pronounced and decreed as aforesaid, the proctor for the appellants entered the present action against the ship Saracen, in the sum of 2,500*l.*, on behalf of his parties, the owners of parts of the cargo laden on board the schooner Diligent, and which action, he admitted, had been prosecuted in the usual manner; but he expressly denied that the non-prosecution in the usual manner of the action first entered by such proctor, as aforesaid, was at the instance, or in any sort with the privity of him, the respondent's proctor. And he also expressly denies that he ever, at any time, recognized the claims of the proctor of the owners' parties, or either of them, to participate ratably with his parties in

* the proceeds of sale of the ship Saracen, or that any pro- [* 63] posals for the division of the proceeds amongst all the owners of The Diligent, and her cargo, in proportion to the damage sustained by them respectively, were ever made to him at any time prior to the month of June last, or that his parties ever entertained any such, or subscribed their names to any agreement to that purport or effect, or that he, or his parties, had done any act whatever whereby

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the prior claim of his parties to be reimbursed out of the proceeds, (so far as the same would extend,) under and arising out of the circumstances aforesaid, had been lost or forfeited. And he further alleged that the schooner *Diligent*, with her tackle, apparel, furniture, and stores, at the time she was run down and sunk by the ship *Saracen*, was of the value of 1,100*l.* and upwards; and that the goods and cargo shipped on board the schooner by his party, Francis Casey, and which were on board at the period aforesaid, were of the value of 2,250*l.*, or thereabouts; and he prayed the judge that he would be pleased to direct the proceeds of the sale of the ship *Saracen*, remaining in the registry of the court, amounting to 1,037*l.* 15*s.* 6*d.*, to be paid out to him, in behalf of his parties, the claims of his parties, together with all accounts and vouchers relative to the same, being first referred to the registrar and merchants, to report thereon, as usual; and that he would be pleased to condemn the appellants in the costs and expenses of the petition.

On the 25th of March, 1846, the judge of the High Court of Admiralty, by his interlocutory decree, rejected the act on petition on behalf of the appellants, praying that they might be [*64] pronounced to be entitled to participate ratably with the respondents in the proceeds of the vessel, *The Saracen*. From which sentence¹ this appeal was brought.

Mr. Roupell, Q. C., and *Dr. Harding*, for the appellants. This appeal raises two questions: First, whether the interlocutory decree of the 6th of May, 1845, pronouncing for damage and condemning the ship, and referring it to the registrar and merchants to report the amount of such damages, was a definitive and final decree, so as to prevent the respondents, the other part owners of the cargo, from coming in and claiming a ratable distribution in the proceeds of the vessel in court; and, secondly, whether the fifteenth section of the 53 Geo. III. c. 159,² does not give an equitable jurisdiction to the

¹ See the case reported, *nom.* *The Saracen*, 2 W. Rob. Adm. R. 451.

² An Act to limit the Responsibility of Ship Owners in certain Cases. Section. xv. enacts: — "That if any suit for any such loss or damage, as aforesaid, shall be instituted or depending in any court competent to act as a Court of Equity, for the purposes of this act, such court shall, and is hereby authorized and empowered to proceed in such suit for such purposes, in the same manner, and under the same regulations, and with the same powers, as are herein given to Courts of Equity, so far as the same are applicable to the nature of such court, and the forms of proceeding therein, and such court shall use all such means as a Court of Equity is by this act empowered to use for the purposes of this act."

Court of Admiralty, on the application of the owners, to decree a distribution of the proceeds of the condemned ship, notwithstanding the other part owners may have previously obtained a decree for damages.

I. The interlocutory decree of the 6th of May was * not [* 65] a definitive decree; it was simply a reference to the registrar and merchants, to ascertain the damage, and a report must be made by them before the court would order the money to be paid out of the registry. It was not, therefore, such a judgment as either in the Court of Admiralty, or any other court, could be considered as a final and definitive decree. The warrant for the arrest of the ship amounts to nothing more than an injunction to detain the ship; and, by the practice of the Admiralty Court, the possession of the ship is then given to the party proceeding, when security to abide the result of the action is required by the court. The court never gives out the proceeds without taking security. There is, therefore, nothing in this proceeding which can bar the claim which the appellants make, unless the interlocutory decree of the 6th of May, 1845, can have that effect. The practice of the Admiralty Court, upon the reference to the registrar and merchants, is, where there is no opposition, that the registrar certifies the amount of sale, and, upon his certificate, the amount is paid. The form of a bail bond,¹ com-

¹ The following is the form of a bond, to answer latent demands in a suit for wages:—

“The proctor produced as sureties . . . who, submitting themselves to the jurisdiction of her Majesty's High Court of Admiralty of England, bound themselves, their heirs, executors, and administrators, for . . . a seaman on board the ship, in the sum of . . . of lawful money of Great Britain, unto our sovereign lady the queen, to restore the sum of £ . . . of like money, pronounced to be due to the said . . . for his services on board the said ship . . . by decree of the said court, bearing date . . . and now about to be paid out of the proceeds arising from the sale of the said ship or vessel remaining in the registry of the said court, to the said . . . in case any person shall come in for his interest in the said sum of £ . . . or any part thereof, and shall repay the contumacy fees, as taxed in this cause, and shall put in sufficient security to answer the action commenced in this behalf, and for his personal appearance in judgment, at such times as the same shall be required, and to pay what shall be adjudged, with expenses; and they further bound themselves, their heirs, executors, and administrators, to bring into the registry of the said court the said sum of £ . . . whensoever the court shall so order, and to save harmless the judge, registrar, and marshal, and all other officers of the said court, as to the payment of the said sum of £ . . . or any part thereof; and unless they shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs', executors', and administrators' goods and chattels,

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[* 66] monly used in admiralty proceedings, *shows that the party is bound to bring back the money, to answer any latent demands. In this case no bail bond has been given, because there has been no *ultimum decretum*.

II. The effect of the statute 53 Geo. III. c. 159, was to secure a ratable distribution of the proceeds of the ship and freight. We submit that section vii. of that statute¹ gives to the Admiralty

Court a jurisdiction similar to a Court of Equity, whereby [* 67] an *equitable distribution would be insured. The court below said we came in after decree, but we submit that this decree did not make the matter *rem judicatam*.

[SIR HERBERT JENNER FUST. The interlocutory decree, condemning the ship and ordering the sale, is a definitive sentence.]

It has only fixed the liability of the ship to pay something. The respondents only got a reference to ascertain the amount of damage; they have no right to any portion of the proceeds by virtue of that interlocutory decree, but only upon the certificate of the registrar; and if that certificate be contested, the court must again pronounce upon the question of amount. Cases have occurred where a Court of Equity has pronounced a decree, but referred it to the officer of the court to make inquiries; and a Court of Equity has held that such judgment does not give priority. *Smith v. Eyles*.² In that

wheresoever the same shall be found, to the value of the sum of £ . . . before-mentioned, which caution the said surrogate received, on the report of John Deacon, deputy marshal of the said court, as to the sufficiency of the said sureties."

¹ Section vii. "That if several persons shall suffer any loss or damage in or to their goods, wares, merchandise, ships, or otherwise, by any means for which the responsibility of any owner or owners is limited by this act, as aforesaid, and the value of the ship or vessel, with all her appurtenances, and the amount of the freight estimated as herein is mentioned, shall not be sufficient to make full compensation to all and every the person and persons suffering such loss and damages, it shall and may be lawful to and for the person or persons liable to make satisfaction for such loss or damage, or any one or more of them, on behalf of himself, or themselves, and the other owner or owners of the same ship or vessel, to exhibit a bill in any Court of Equity, having competent jurisdiction against all persons who shall have brought any such action or actions, suit or suits, as aforesaid, and all other persons who shall claim to be entitled to any recompense for any loss or damage, arising or happening by the same separate and distinct accident, neglect, or default, or on the same occasion, to ascertain the amount of the value of the ship or vessel, appurtenances, and freight, and for the payment or distribution thereof, ratably, amongst the several persons claiming recompense, as aforesaid, in proportion to the amount of the several losses or damages sustained by such persons so claiming such recompense, as aforesaid, according to the rules of equity, as the case may require."

² 2 Atk. 385 - 7.

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case it was held, that a decree *quod computet* does not pass *in rem judicatam* till the final decree. It is perfectly well settled that, where a single creditor files his bill for the recovery of his own debt only, the court is under no disability of making a general decree for administration. 1 Story's Comm. on Eq. Jur. p. 446, (2d edit.) ; Ram on Assets, ch. 8, p. 143. * It has been frequently decided that [* 68] the Court of Admiralty is a Court of Equity, and is bound to administer equity broadly and equitably. *The Minerva*;¹ *The Jacob*;² *The Harriett*;³ *The Alexander Larsen*;⁴ *The Columbine*.⁵ Indeed the court has, in two instances, *The Margaret*⁶ and *The Richmond*,⁷ in circumstances similar to the present, decreed a ratable distribution. The fifteenth section of the statute 53 Geo. III. c. 159, must be construed so as to give it some effect, and that cannot be done without extending its provisions to the Court of Admiralty. The learned judge of the court below held, that the right of filing a bill in equity is exclusively given by that act to the owners for their protection, and not to the claimants for their advantage.⁸ Is the equitable distribution, for which this statute provides, to depend upon the circumstance of whether the owner files a bill under the statute?

Assuming, then, that the Court of Admiralty founds its decisions upon equitable principles, can it be possible that, where there may be many part owners of a cargo, some in the country, others absent in different parts of the world, those absent parties are to be excluded from their rights, in consequence of a *prior potens*, although those absent parties came to the court as soon as they could? Can mere accident be a principle of equity? Suppose the case of several actions and no mode of consolidation; should not the court have the power either of withholding its final *decree, or [* 69] advancing the last causes? The court below, in the present case, having had distinct notice of our claims by the commencement of the second suit, and sitting as a Court of Equity, should not have proceeded to a final judgment, which would bar the other parties, who had equal rights with those who obtained the judgment. The reason for the abandonment of the second suit is satisfactorily accounted for, by the agreement which has been come to by the proctors for the appellants and the respondents, and which is pleaded in our act on petition.

¹ 1 Hagg. Adm. R. 357.

³ 1 W. Rob. Adm. R. 192.

⁵ 2 W. Rob. Adm. R. 186.

⁷ Not reported.

² 4 Rob. Adm. R. 245.

⁴ 1 W. Rob. Adm. R. 289, 297.

⁶ Not reported.

⁸ 2 W. Rob. Adm. R. 457.

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Dr. Addams and *Mr. Bovill*, for the respondents. It is not denied that the Court of Admiralty may be, for some purposes, a Court of Equity; but this is not a case in which the Court of Admiralty could interfere, or was competent to order a ratable distribution, after the decree obtained by the respondents. Here there is nothing whatever to justify the court letting in the appellants; they are entitled to no indulgence. They waited till we had obtained a decree in our favor, and, on the very day of the sentence they claimed to be let in, to share ratably in the proceeds of the condemned ship. Suppose the sentence had been against us, could we have claimed a share of the costs from the parties claiming to intervene? No authority has been cited in support of the appellants' argument, that, by the fifteenth section of the statute 53 Geo. III. c. 159, the Court of Admiralty being a Court of Equity, was bound to do something which would compel a ratable distribution among the claimants. The case of *The Richmond*, referred to in support of this position, is not in point.

[SIR HERBERT JENNER FUST, after referring to the registrar's book, said that *the question in that case was, whether the owner was liable to the extent of the bail, or only to the ascertained value of the ship.]

Neither can the case of *The Margaret* be recognized as an authority. The argument from analogy, to the decisions of a Court of Equity, is in favor of the respondents. *Lee v. Park*.¹ 1 Story's Comm. on Eq. Jur. p. 443, (2d edit.) The doctrine of *prior potens*, in the Admiralty Courts, is nothing more than a branch of the rule, "*Vigilantibus non dormientibus leges subservient;*" as in the case of a judgment obtained at law. An executor has priority on a judgment. "*Qui priore est in jure potior est in juro.*"

[LORD CAMPBELL. The principle of the common law is* to give priority to a party obtaining a judgment.]

In the Ecclesiastical Court, a creditor taking the risk of administration, where the intestate's estate is insufficient, has priority, and pays himself first. So in bankruptcy. If a party does not prove before a dividend is declared, he is excluded the benefit of the existing funds. The same rule applies on an attachment in the Lord

¹ 1 Keen, 714.

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Mayor's Court. Every principle is in favor of the respondents. If the appellants' argument was sound, it would lead to great inconvenience. How long might a party lay by? When is he to be excluded? Is the fund to be distributed or kept?

[LORD LANGDALE. The form of the citation in this case is for all parties to come in. The practice in the Court of Chancery is to advertise, to bring parties in, which is different from the practice in the Admiralty Court.]

The Admiralty Court has no power to bring in parties. There is no contract between the parties; and even if there was a contract, it is not such a one as the Court of Admiralty could enforce. The appellants put their *case upon the 53 Geo. III. c. 159, [*71] which does not apply. That statute was only passed for the purpose of limiting the liability of the owner of the ship proceeded against, and is *in pari materia* with the 7 Geo. II. c. 15, and 26 Geo. III. c. 86. No question can be raised upon the alleged agreement between the proctors, as set forth in the appellants' act on petition. If such an agreement exists, it ought to have been the subject of a distinct proceeding. The appellants have not established any thing like bad faith on the part of the respondents.

[LORD LANGDALE. The court is with you on that point.]

Neither can any question be raised upon the form of the bail bond, which only undertakes for payment of latent demands within a year and a day from the date of the bond.

[LORD CAMPBELL. This appeal really resolves itself into the question, whether the interlocutory decree of the 6th of May, 1845, was a final decree. The proceeds of the ship being in court.]

That decree had the force and effect of a definite sentence. The money would have been paid out under that decree, as a matter of course, if these other parties had not asked to be let in to share.

Mr. Roupell, in reply. This is a case of extreme difficulty, and one *primæ impressionis*. Now what was the real effect of the decree of the 6th of May, 1845? It only gives directions for the purpose of ascertaining the amount due to the respondents. There is no order for payment. It gives an inchoate right only.

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[LORD CAMPBELL. There is a judgment, that damages are to be paid; does not that give a party a vested right? The court below considered the ship and proceeds bound by the decree, the same as the land would be by a judgment at law.]

[*72] * The party cannot get paid without the further order of the court; the certificate of the registrar and merchants does not give the right to receive the amount until that is affirmed by the court, and it rests with the court as to what is to be the *quantum*. It cannot, therefore, be considered as a final decree. The practice of the admiralty is now to suspend the payment out of court for a year and a day, and not to require a bond for latent demands. There was nothing in the bond which could exclude claimants of equal degree from coming in to participate. If equitable principles are to apply, what is there in this case to prevent equal distribution, which a court of equity would decree? The funds are in court. Then why are not those principles of equitable distribution to be carried out in the Court of Admiralty? The suit might be altered, so as to make it an action on behalf of all the injured parties; or the party might be compelled to limit his action for his proper proportion. There is nothing to preclude a Court of Equity, in a case like this, where the fund has not been adjudicated upon, from distributing the fund; for it is a principle of Courts of Equity that, until the time of actual distribution, a party is not too late in making his claim, unless estopped by other circumstances.

February 19th, 1847. Their lordships reserved judgment, which was now delivered by

LORD LANGDALE. This is a case of collision between The Saracen and The Diligent, in which The Diligent and her cargo were lost.

On the 25th of February, 1845, an action for damage [*73] * was commenced, in the High Court of Admiralty, against the owners of The Saracen, by the respondents, the owners of The Diligent, and the owners of part of her cargo.

A warrant to arrest The Saracen (a foreign ship) was issued, and, on the 19th of March, was returned duly executed.

On the 12th of March, another action against the owners of The Saracen was commenced, by the owners of other parts of the cargo of The Diligent; but this action was afterwards abandoned, and no effective proceedings were had therein.

The action of the respondents was duly prosecuted, and, on the

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6th of May, 1845, an interlocutory decree, having the force of a definitive sentence in writing, was made therein; and, by such decree, the court pronounced for the damage proceeded for in that cause; condemned the ship and freight therein and in costs; referred the damages, together with the accounts, to the registrar and merchants; and decreed a commission for appraisement and sale of The Saracen, her tackle, apparel, and furniture.

On the same 6th of May, a new action for damage was commenced against the owners of The Saracen, by the appellants, owners of part of the cargo of The Diligent.

The proceeds arising from the sale of The Saracen were brought into the registry; and the appellants, whose action was commenced on the 6th of May, claimed to be entitled to participate in the proceeds of the ship Saracen, remaining in the registry. After a full discussion, the judge, on the 25th of March, 1846, rejected the claim.

* The appeal is from that decision; and, in support of the [* 74] appeal, it was argued:—

First. That the High Court of Admiralty has an equitable jurisdiction, in the exercise of which, in a case like the present, it ought to proceed in the same manner as a Court of Equity would proceed in the administration of assets, or in the distribution of any common fund, which is to be distributed *pro rata* among several persons, interested in or having claims upon it.

Second. That the statute 53 Geo. III. c. 159, confers on the court a jurisdiction which ought to have been exercised for the benefit of the appellants. And,

Third. That the agreement between the parties precluded the respondents from claiming the whole fund for themselves.

In the course of the argument we expressed our opinion, that no effect can, on this occasion, be given to the alleged agreement.

First. With respect to the equitable jurisdiction, it is true that, in the decisions of cases properly within the jurisdiction of the Court of Admiralty, equitable considerations ought to have their weight; but it does not thence follow that the Court of Admiralty has jurisdiction to do all that Courts of Equity may do, in suits instituted by persons suing, either for themselves, or on behalf of themselves and others, for the administration of assets, or the distribution of a common fund, in which several persons are interested, or upon which they have claims. No instance of the exercise of any such jurisdiction has been cited; and, in the absence of any authority, it does not appear to us that there is any such jurisdiction.

* It was suggested that the bail bond, required on pay- [* 75]

ment of money to a claimant for damage, shows that other claims than those upon which the payment is made, have to be provided for; and, perhaps, it may be so. But there may be claims paramount, such as claims for wages; and, at the time when the form of the bond was settled, the claims of material men, &c., may have been considered to require attention. The bail bond may, therefore, be well understood as providing for paramount claims. There seems to be no reason to conclude that the bond is applicable to claims merely coördinate with those of the party who obtained the sentence. Moreover, as no instance has been shown of the exercise of any such jurisdiction, it seems unreasonable to infer that there is such jurisdiction because such a bond is taken.

Second. The 53 Geo. III. c. 159, was passed for the protection of the owners of ships, and appears to apply only to bills in equity, and suits or proceedings instituted by or on behalf of the owners. The fifteenth clause may be applicable to suits for damage in the admiralty, accompanied by a proceeding, on the part of the owners, for their own protection, and which may lead to a distribution, *pro ratâ*, of the proceeds of the ship among the claimants. But there is no such proceeding here. The action of the respondents was brought by them as individuals, for their own benefit; there is no proceeding by the owners under the statute, and the sentence was pronounced for their benefit, subject only to such claims as may be made thereon under the bail bond.

We are of opinion that the sentence of the 6th of May, 1845, is to be considered as a definitive sentence in favor of the [* 76] respondents; and that the appellants, * whose suit was not commenced till after the sentence was pronounced, are not entitled to participate in the proceeds of the ship in common with the respondents, by whose diligence, and at whose risk and expense, the damage has been pronounced for, the ship condemned, and the proceeds realized.

We shall, therefore, report to her Majesty that, in our opinion, the appeal ought to be dismissed, and the sentence affirmed, with costs.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

THE DUKE OF MANCHESTER.

[* 90]

Richard Shersby and others, *Appellants*; and Samuel Hibbert and others, *Respondents*.¹

July 1, 1847.

A sailing vessel, having a licensed pilot on board, got on the Goodwin Sands, but was rescued by a steam-tug, which, after rendering her salvage services, was employed to tow the vessel to the Downs, but in consequence of the misconduct of the pilot and the negligence of the master of the steam-tug, the vessel was run ashore on the Sandwich Flats. *Held*, in such circumstances, that the steam-tug had no claim for salvage, as the master of the steam-tug was not released from all responsibility respecting the direction of the vessel towed, by reason of a licensed pilot being on board, and that it was the joint duty of the pilot and the master of the tug to do their utmost for the safety of the ship.

Held, also, that the master of the steam-tug could not separate the towing of the vessel from his claim for salvage services for getting her off the Sands, as it was one transaction of salvage.

THIS was originally a cause of salvage, civil and maritime, brought by the appellants, the master, and owners, and crew of the steam-tug Copeland, against the ship Duke of Manchester, her cargo, and freight.

The circumstances which gave rise to the appeal were these:—

On the 13th of December, 1845, the bark Duke of Manchester, belonging to the respondents, outward bound, from London to the West Indies, with a general cargo, in charge of a licensed pilot, got upon the Goodwin Sands, midway between the North Sand Head and the Gull light-vessel, at forty minutes past three, P. M.; the wind was moderate, the weather hazy, and it was * then [* 91] within about an hour of low water. All proper precautions were immediately taken; the larboard bower anchor was let go; the bark lay quiet as the tide fell, though she had struck heavily at first; she had thirteen feet water on the starboard, and ten feet on the larboard side. A galley, which came alongside, was sent off to Ramsgate for a steamer, and, arriving there about eight, the steam-tug Copeland, of one hundred horse-power and eight men, which was

¹ Present: Lord Brougham, Lord Langdale, Lord Campbell, and the Right Hon. T. Pemberton Leigh.

The Duke of Manchester. 6 Moore's P. C. Rep.

lying in Ramsgate Hole, with her steam up, immediately put to sea, and discovered the Duke of Manchester, about half-past nine, P. M. On getting near her, about half an hour afterwards, two hawsers, and also the bark's steam-chain, were passed from the bark to the steamer, and the steamer attempted to tow her off; at first by steady pulling, and then by jerking with the full power of her engines. Both the hawsers, and also both the chains, parted or were carried away, and about half-past ten the bark came off the Sand. Upon the bark's coming off the Goodwin Sand, the pilot in charge of her hailed The Copeland to "go to the Downs, and tow ahead." The Copeland accordingly towed the bark a-head for about an hour and a half; they passed the Gull light-vessel about eleven o'clock, and the south buoy of the Brake about twenty minutes past eleven; and between twelve and one, A. M., of the 14th of December, the bark was suddenly hailed from The Copeland to "starboard her helm," (that is, to turn her head in-shore,) which she immediately did, and again got hard aground on the Sandwich Flats, when it was nearly the top of high water. On the bark's thus grounding for the second time, it being nearly high water and the tide falling, it was found impossible to move her. Further assistance was obtained from

Ramsgate; The Copeland made two abortive efforts to get [* 92] her off * in the course of the 14th of December. Part of her cargo was then discharged into small craft, and, on the 15th of December, she was again got afloat; and it being impossible to continue her voyage without discharge and repair, was towed by The Copeland to the Downs, to Southend on the 16th, and to the West India Docks on the 17th.

The act on petition on behalf of The Copeland, after setting forth the above facts, alleged that it was with great difficulty and exertion, and with imminent risk of life and property, that the vessel was dragged off the Sands into deep water; that the pilot of the ship then hailed the master of The Copeland to tow her to the Downs, which he did, by keeping as nearly as possible directly ahead of the ship, so as to have her masts in one, according to the invariable custom of steam-tugs in towing vessels in charge of a pilot; and that the steam-tug was proceeding to tow her to the Downs, but that, in consequence of the damaged condition of her rudder, The Duke of Manchester would not answer her helm, and again took to the ground on the Sandwich Flats.

The answer of the respondents, the owners of The Duke of Manchester, alleged that the vessel was extricated from the Goodwin Sands, not by the exertions of The Copeland, but by the influence of the tide; that the vessel, whilst upon the Sands, was in no danger of

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being lost; and that no risk, or loss of life or property, was incurred by the master or crew of *The Copeland*; that, when she got off the Goodwin Sands, *The Duke of Manchester* had sustained no damage, and that her consequent injuries were occasioned by the gross negligence and misconduct of the steamer, in towing her out of her proper course to the Downs, and running her aground on the Sandwich Flats.

* In the surrejoinder, filed by the respondents, it was [* 93] stated that one William Wells, the master of one of the small craft employed, who had remained on board the steam-tug from the time of going to the assistance of *The Duke of Manchester* until the ship went aground the second time, had informed the master of the steam-tug, shortly before the ship ran on the Sandwich Flats, that he was steering too much to the westward, but that the master, nevertheless, refused to alter his course. Wells made an affidavit of this fact, and it was admitted by the appellants in their rebutter; wherein they alleged that such intimation could not have justified the master of *The Copeland* in altering his course of the ship, directed by the pilot in charge of her, and that the master took every precaution that could be required of him. And it further alleged, that an inquiry had been instituted by the Trinity Board into the conduct of the pilot in charge of *The Duke of Manchester* on that occasion; and that the result of that inquiry was, that he was dismissed from their service, and forbidden to pilot vessels in future.

The judge of the Admiralty Court was assisted by two elder brethren of the Trinity House, who were of opinion:—"That the vessel going on the Sandwich Flats was not occasioned by the state of the weather, or the rudder being disabled, and that the stranding might have been prevented with ordinary care and skill; and that there was, on the part of *The Copeland*, gross and culpable negligence, and a disregard of duty." The learned judge of the Admiralty concurred in this opinion, and by his interlocutory decree, bearing date the 10th of June, 1846, pronounced against the appellants' claim for salvage, with costs.¹

* From this sentence this appeal was brought by the [* 94] appellants, who prayed that it might be reversed, for the following reasons:—

First. Because it appeared, from the proofs in the cause, that the services rendered by the steam-tug *Copeland* to *The Duke of Man-*

¹ Reported, *nom.* *The Duke of Manchester*, 2 W. Rob. Adm. R. 470.

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chester were of a most important nature; that they were attended with danger to the steam-tug herself, and to the lives of those on board her; and that they were continued during a considerable time, and were the means of rescuing The Duke of Manchester from impending peril, if not from total loss.

Second. Because it clearly appeared, by the evidence, that the subsequent grounding of The Duke of Manchester on the Sandwich Flats, and any damage consequent thereon, was imputable entirely, and was at the time so imputed by the master of The Duke of Manchester, to the pilot on board of her, whose license to act as a pilot had since, after inquiry, been taken away by the Trinity Board, in consequence of his misconduct on the occasion; and that even if the subsequent grounding of The Duke of Manchester had been occasioned by the negligence of the crew of the steam-tug, it would not deprive the appellants of their right to salvage, unless (and which could not be pretended) the damages arising therefrom exceeded the benefit derived from their previous services.

Third. Because the opinion of the most competent judge (the master of The Duke of Manchester,) as to The Copeland not having been in fault, was apparent, from the fact of his continuing her in his employ after his ship had been a second time run ashore, and from his afterwards engaging her to tow the ship up from the Downs to London.

[* 95] * The respondents, on the other hand, relied, in support of the decree appealed from, upon the following reasons:—

First. Because, after the most careful consideration, by a most competent tribunal, of all the facts in dispute, (which were chiefly nautical,) the decision of that tribunal had been, on every point, distinctly in favor of the respondents; and it was humbly submitted that, without new evidence, their lordships would not reverse such decision.

Second. Because, upon the whole matter, The Duke of Manchester was not salvaged, but injured; and respondents, instead of having derived any benefit from the pretended services of the appellants, had thereby suffered serious loss and damage.

Third. Because The Copeland did not tow The Duke of Manchester off the Goodwin Sands, nor did she incur any danger in attempting to do so.

Fourth. Because The Copeland did, by the grossest and most culpable negligence and misconduct, tow The Duke of Manchester ashore on the main land, (on Sandwich Flats,) in an easy and well-known channel, at nearly high water, in calm weather, having shortly before seen the Gull light; having been previously warned that she

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was going too far to the westward; and after having just before hailed The Duke of Manchester to put her helm to starboard, (that is, her head in-shore.)

Sir Frederick Thesiger, Q. C., and Dr. Addams, for the appellants. The stranding of The Duke of Manchester on the Sandwich Flats was solely the fault of the licensed pilot, and any damage occasioned by it is imputable * entirely to him, and not to [* 96] The Copeland. But even if the subsequent grounding of The Duke of Manchester had been occasioned by the negligence of the master and crew of The Copeland, it would not deprive the appellants of their right to salvage for getting The Duke of Manchester off the Goodwin Sands, unless the damage arising therefrom exceeded the benefit derived from their previous services.

[LORD CAMPBELL. It was a continuous transaction; the service was not completed by getting the vessel off the Sands; she was to be got to a place of safety.]

That was a subsequent transaction; the services consisted of two separate transactions, and the two claims may be distinguished. Suppose the vessel was got off the Goodwin Sands by The Copeland, but for whose aid she would have been lost, and afterwards, by the gross negligence of The Copeland, she stranded on the Sandwich Flats, and received a very slight injury; would that annihilate the claim for a very meritorious prior service? The claim for salvage attached when the vessel was rescued from the imminent peril on the Sands. The damage sustained by grounding on the Flats was very trifling. It is an invariable rule, that it is the duty of a tug-steamer to obey the directions of the vessel in tow, more especially when in charge of a licensed pilot. He is released from all responsibility respecting the direction of the vessel; all he has to do is to keep her masts in a line with his own. It would be dangerous to allow a tug to interfere with the pilot on board the vessel towed, whose duty it is to direct the course. See what the consequence would be if the master of the tug was to exercise his discretion; he would, in effect, depose the pilot from his authority. In the case of *The Duke of * Sussex*,¹ a steam-tug, employed [* 97] in towing a vessel having a licensed pilot on board, was held not responsible for a damage occasioned by the vessel coming

¹ W. Rob. Adm. R. 270.

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in contact with another vessel. Upon the principle there laid down, we contend that the towed and towing vessels are to be considered as one; that the licensed pilot on board the former is to be considered in charge of both, and that the responsibility attaches solely to him.

[LORD CAMPBELL. Is there not a distinction between the case of a tug employed to tow a vessel, and a tug which is a salvor? This is a claim for salvage.]

We submit that the principle is the same.

The *Queen's Advocate*, (Sir John Dodson,) *Mr. Bethell, Q. C.*, and *Dr. Harding*, for the respondents. The steam-tug Copeland is not entitled to salvage. We do not question the rule laid down by the learned judge in the case of *The Duke of Sussex*, which casts the responsibility of directing the course of a vessel in tow upon the pilot on board; which is very wholesome and proper in the case of towage, but in a case of salvage different duties are imposed upon a steamer, when she is the salving vessel. The getting the vessel upon the Sandwich Flats must have arisen from the negligence or misconduct of some person; it must be either wilful, or through gross and culpable negligence. If it be said that the steam-tug must steer as the vessel was steered, that involves the proposition that the vessel could be steered freely without impediment. Now the case of the appellants, as raised by their pleadings, is, that her [*98] rudder was damaged, *and that she could not answer her helm. If so, then, when she got off the Goodwin Sands, on whom lay the duty to shape her course? It must have been on the steamer, which was the salving vessel, as the vessel could not answer her helm. Here is a steamer towing a disabled vessel, to whose assistance she had come, along a channel familiar to the steamer, and permits the vessel, which could not guide herself, to get on shore.

[LORD BROUGHAM. Is the steamer answerable for the damage?]

When a steam-vessel takes a disabled vessel in tow, she is bound to exercise a careful and watchful superintendence; and if the disabled vessel gets into danger whilst being towed, the steamer is answerable; and, if a salvor, she forfeits her claim to reward. The damage occasioned by getting on the Sandwich Flats cancels the merit of the prior service.

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LORD CAMPBELL. This is an appeal in a cause of salvage, by the owners and crew of the steam-tug Copeland, against the ship The Duke of Manchester, her cargo, and freight. The learned judge of the Court of Admiralty having been assisted by two elder brethren of the Trinity House, by his decree disallowed the claim, and condemned the claimants in costs.

Their lordships cannot accede to the first reason for affirming the decree propounded by the respondents, namely, that all the facts having been considered by a competent tribunal, its decision ought not to be reversed without new evidence. We are bound to see whether, in our opinion, the decree appealed from is well supported, in point of fact as well as in point of law.

* In the first place, their lordships entirely approve of the [* 99] law as laid down by Dr. Lushington. The question of law is, whether, in case of salvage, where a tug is towing a ship that is in peril to a place of safety, the ship being under the command of a licensed pilot, the master of the tug is released from all responsibility respecting the direction of the ship, and is merely to keep her masts in a line with his own. The learned judge below repudiated the doctrine, that, under no circumstances, was it the duty of the master of the tug to interfere, and that the pilot was, under all circumstances, the only person to blame; and he laid down, that the master of the tug, watching the course which the licensed pilot pursues, if he finds that this course will lead the vessel into danger, is bound to interfere, and make a communication to the master of the ship, instead of making himself instrumental to the destruction of life or property. Their lordships are entirely of the same opinion, and consider it the joint duty of the licensed pilot and of the master of the tug, to do their utmost for the safety of the ship. Therefore, however much the licensed pilot may misconduct himself, if the master of the tug, through gross negligence, omits to do what was in his power to keep the ship in a proper direction, that she may reach a place of safety, and thereby the ship is lost, or is led into peril as great as that from which she has been rescued, all claim to salvage is forfeited. This is not a claim for ordinary work and labor, but for salvage. The very notion of saving a ship supposes that the salvor, instead of merely executing orders, shall perform some extraordinary service, and exert himself to the utmost for the safety of life and property.

* In this case, the elder brethren of the Trinity House [* 100] found, "that the stranding on the Sandwich Flats might have been prevented by ordinary care and skill, and that there was, on the part of The Copeland, gross and culpable negligence." The

damage occasioned by this stranding appears to have been greater than that occasioned by the stranding on The Goodwin Sands; and, therefore, if the finding was justified by the evidence, the claim to salvage was properly disallowed.

Now, although the pilot clearly was guilty of negligence, and was very properly dismissed from the service, the master and crew of the tug were likewise guilty of gross negligence, and their conduct even raises a suspicion that they had some ill design. Belonging to Ramsgate, they must have been familiarly acquainted with the ground; and the course taken by the ship, after she was got off the Goodwin Sands, was clearly not the course to the Downs, whither they were told the ship was to be carried. But further, it is expressly alleged in the pleadings by the respondents, and not denied by the appellants, that "William Wells, not long before the ship was towed ashore on the Sandwich Flats, told the master of The Copeland that he was steering too much to the westward, but that the said master refused to alter his course." Indeed the learned counsel for the appellants, in their arguments at the bar, relied upon the doctrine, that the ship being under the care of a licensed pilot, the master of the tug had nothing whatever to do with her direction, beyond keeping her masts always in a line with her own. Looking to the state of the wind and weather, there seems not to be the smallest doubt that, by a reasonable exertion of care and skill on the part [* 101] of the tug, the ship might easily have been brought to a place of safety in the Downs, and enabled to pursue her voyage to the West Indies, instead of being again stranded, and obliged to be brought back to port to refit. There has, therefore, been no meritorious service, in respect of which salvage ought to be decreed.

An attempt was made to separate the towing of the ship from the operation of getting her off from the Goodwin Sands; but their lordships are of opinion that they cannot be severed, that there was no fresh engagement, and that the whole forms one transaction of salvage. When the ship had been got off, there was reason to apprehend that her rudder had been injured, and, without forfeiting right to salvage, the tug could not then have deserted her. The claimants, in their pleadings, describe the whole of their services as of the same character, and claim extraordinary remuneration for the whole, on the principle of salvage.

Their lordships will therefore advise her Majesty, that the decree appealed against should be affirmed, with costs, to be paid by the appellants.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF
SAINT HELENA.

* THE AQUILA.

[* 102]

Our Sovereign Lady the Queen, *Appellant*, and Jose Alves Dias,
Respondent.¹

February 19, 1847, and June 22, 1849.

By the 35th section of the rules respecting appeals from the Vice-Admiralty Courts abroad, made under the authority of the statute 2d & 3d Will. IV. c. 51, all appeals are to be asserted within fifteen days after the date of the decree appealed from. In March, 1846, a decree was pronounced by the Vice-Admiralty Court of St. Helena, restoring a vessel seized by a British cruiser for an alleged infraction of the Slave-Trade Act, and referring the amount of costs and damages to the registrar. No appeal was asserted by the seisor's proctor, who attended before the registrar under the decree. In the month of December of that year, a petition of appeal was brought in by the Queen's proctor, on behalf of the seisor, which the registrar (in consequence of the appeal not having been asserted within fifteen days) refused to receive. On an application made *ex parte*, supported by affidavits stating that it was the seisor's proctor's ignorance of the rule for asserting the appeal, which alone prevented him from appealing, leave was given to appeal, subject to a counter-petition being presented by the respondent to dismiss the appeal.

Upon an act on protest against the right of appeal by the respondent, held by the judicial committee, that there was no sufficient ground to enable them to allow the appeal.

THIS was originally a cause instituted in the Vice-Admiralty Court of St. Helena, by Henry Layton, Esq., commander of her Majesty's sloop *Cygnets*, against the schooner *Aquila*, seized by the sloop, as having been at the time of the seizure thereof equipped for, or engaged in, the slave-trade, or employed in the illegal traffic of negroes and others for the purpose of consigning them to slavery, and as such, by virtue of the statute, liable to forfeiture and condemnation.

* All due and legal proceedings were had in the Vice-Admi- [* 103]
ralty Court of St. Helena, and on the 19th of March, 1846, the judge and commissary of that court, by his interlocutory decree, pronounced, that the proctor on behalf of the seisor, had failed in proof of the contents of the libel given in and admitted, and decreed the schooner to be restored to the claimant for the use of the owners and proprietors thereof, and condemned the seisor in costs and damages.

¹ Present: Lord Brougham, Lord Langdale, the Right Honorable Dr. Lushington, and the Right Honorable T. Pemberton Leigh.

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No appeal from this decree was asserted or interposed, in the Vice-Admiralty Court of St. Helena. The amount of costs and damages having been referred to the registrar and merchants to report thereon, and the registrar and merchants held meetings upon the subject, when the proctor for the seizor was heard in objection to the amount claimed on account of such costs and damages. On the 5th of June, 1846, the registrar and merchants made their report, wherein they reduced the amount originally claimed, from the sum of 8,799*l.* 17*s.* 11*d.* to the sum of 2,318*l.* 15*s.* This report was confirmed on the 2d of July, 1846.

On the 4th of December, 1846, her Majesty's procurator-general, under the direction of the lords of the treasury, presented his petition of appeal on behalf of her Majesty, from the above decree of the judge of the Vice-Admiralty Court of St. Helena; but in consequence of the appeal not having been asserted within fifteen days, and an entry made of that fact in the Court of the Vice-Admiralty of St. Helena, as required by the 35th section of the regulations made pursuant to the statute 2 & 3 Will. IV., c. 51, for the vice-admiralty courts abroad, the registrar declined to receive the appeal, when the Queen's proctor prayed that his petition and appeal might be referred to the judicial committee of the privy council.

[*104] * December 15, 1846.¹ The *Queen's Advocate*, (Sir John Dodson,) now moved, on behalf of the crown, that the appeal might be received: he referred to the 35th section of the regulations for Vice-Admiralty Courts abroad, and the act to amend and consolidate the laws relating to the abolition of the slave-trade, 5th Geo. IV. c. 113, which, by section twenty-nine, fixes no limit for the time of appeal, if the inhibition is decreed within twelve months from the date of the decree. The vessel having been seized under the 8th & 9th Vict. c. 122, he contended, brought the case within the provision of the former statute.

LORD BROUGHAM. The regulation referred to is made, among others, under the authority of an act of parliament, the 2d & 3d Will. IV. c. 51, and is similar to the rules in the Court of Chancery under various statutes: they would be of no value if they are to be dispensed with on any cause. No merits are shown: but the matter may stand

¹ Present: Lord Brougham, Lord Langdale, the Right Honorable Dr. Lushington, and the Right Honorable T. Pemberton Leigh.

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over to enable the crown, if there are merits, to bring them properly before us.

In pursuance of the leave thus given, the Queen's proctor filed two affidavits; the first by Lewis Gideon, of the island of St. Helena, stating that he was one of the partners in the house of trade carrying on business under the firm of Gideon & Son, of St. Helena, merchants, and that to the best of his recollection and belief, in the month of November, 1845, instructions were received by his, deponent's son, Henry Hamer Gideon, from Henry Layton, the commander of her Majesty's sloop Cygnet, to take the necessary proceedings *for obtaining a sentence of condemnation against the Bra- [* 105] zilian schooner called The Aquila, whereof Joze Alves Dias was master, which had been captured by Layton, as liable to forfeiture, for having been equipped for, or engaged in, the slave-trade, or employed in the illegal transport of negroes or others, for the purpose of consigning them to slavery. That about three years ago, as near as he could recollect, the deponent's son and partner was admitted a proctor of the Vice-Admiralty Court at St. Helena without having been articulated to any proctor or solicitor, or without having had any legal education, and had since carried on his proctorial business on his own account, and totally independent of the deponent, and in which the deponent had no interest whatever. That his son commenced proceedings in the Vice-Admiralty Court at St. Helena, against the Brazilian schooner, for the purpose aforesaid; and on the 19th of March, 1846, the cause came on for hearing before his honor, the judge of the court, when he, by interlocutory decree, admitted the claim of Joze Alves Dias, and pronounced that this deponent's son had failed in proof of the libel and exhibits given and admitted in the cause, and decreed the schooner and her cargo to be restored to the claimant, and condemned the seizor in costs and damages. That there are only five proctors practising in the Vice-Admiralty Court, three of whom were merchants; one a military officer in the East India Company's service; and the other an assistant in a mercantile house; and that none of the five persons, to the best of deponent's knowledge or belief, ever had any legal education; and he was confident his son would have entered an appeal from the decree, had he known it was necessary to have given a formal notice thereof, *within fifteen days from the date of the decree, and [* 106] that he acted entirely from ignorance of the law in not doing so, there never having been, so far as this deponent knows or believes, any precedent of an appeal from that court. That the judge of the court is the only lawyer on the island; and, consequently, there was

no legal person with whom his son could advise on the subject. That from the conversations which passed between the deponent and his son, they both felt satisfied the schooner would have been condemned, and, consequently, were much surprised when the decree was pronounced by the judge aforesaid. That his son attended the meetings of the registrar and merchants for the purpose of ascertaining the amount of such damages, as the deponent's son acted under the impression that no appeal could be prosecuted, unless the damages and costs were ascertained to exceed a given sum; because it is provided in the order in council for establishing the due administration of justice on the island, that no appeal should be allowed, except where the sentence pronounced for or in respect of any sum or matter at issue above the amount of 500*l*. But the deponent has, since his arrival in this country in the month of November last, been informed that such order in council does not apply to the Vice-Admiralty Court, but only to the Supreme Court.

The second affidavit was made by Henry Layton, the commander of the sloop "Cygnet;" and, after stating the circumstances of the capture, and the proceedings taken against the vessel, he further stated, that during the whole time the proceedings were being carried

on, he was cruising off Benguela for the suppression of the [* 107] slave-trade, and, consequently, * had no opportunity of communicating with Hall, the prize-officer, and Gideon, his proctor: and being fully assured in his own mind that the vessel would be condemned, his orders to Hall were to return to the "Cygnet," with the least possible delay, the deponent having only one officer left on board to do the duties of his ship. And he said, that if he had been at St. Helena when the judge of the Vice-Admiralty Court restored the vessel, and condemned the seizor in costs and damages, he would undoubtedly have appealed to the judicial committee of her Majesty's most honorable privy council, and he thought that his proctor ought to have preserved the right to appeal until his directions could have been taken on the subject.

February 19, 1847.¹ The *Queen's Advocate* moved for leave to prosecute the appeal upon the above affidavit.

LORD BROUGHAM. If the act of parliament authorizes rules to be made, those rules are part of the act. There is no limitation as to

¹ Present: Lord Brougham, Lord Langdale, the Right Honorable Dr. Lushington, and the Right Honorable T. Pemberton Leigh.

the time to appeal, under the act 2d & 3d Will. IV. c. 51; but by the rules made under its authority, an appeal must be asserted within fifteen days from the sentence. Under the circumstances, leave will be given to lodge this appeal, but the other side may present a counter-petition to rescind the leave thus given. The leave to appeal is, therefore, subject to the right of the respondents to present a petition to dismiss.

* In consequence of the leave thus given, her Majesty's [*108] proctor brought in and filed his petition and appeal, and obtained the usual inhibition.

The appeal was in the ordinary form, and was supported by the affidavits above-mentioned.

To this appeal the respondents' proctor objected, and brought in an act on protest, wherein he alleged, that by the rules and regulations touching the practice to be observed in suits and proceedings in the several courts of vice-admiralty established in her Majesty's possessions abroad, it was, among other things, ordered, that all appeals from decrees of vice-admiralty courts be asserted within fifteen days after the date of the decree, in manner as therein ordered, and that the party so appealing shall give bail, within fifteen days from the assertion of the appeal, in the sum of one hundred pounds sterling, to answer the costs of such appeal, after which only, by the rules and regulations, the judge and registrar can be duly served with an inhibition from the superior (the appeal) court, and a monition for the transmission of the process. And he expressly alleged, that in the present instance, the rules and regulations aforesaid had not been complied with, nor had any or either of them; on the contrary, that the schooner *Aquila* and her cargo having been decreed to be restored to their owners, and the seizer condemned in costs and damages, on the 19th day of March, 1846, the only pretended appeal from such sentence or decree was that of the 4th of December in that year: on that day, her Majesty's proctor had lodged a petition of appeal on behalf of her Majesty and the captor, in the registry of the High Court of Admiralty and Appeals, and in virtue of which pretended appeal had in *fact issued, and been served, the [*109] inhibition and citation, to which latter his proctor had appeared for his party under protest. And he further alleged, that after the sentence or decree, for the restitution of the schooner and her cargo to their owners, with costs and damages against the seizer, (being the sentence appealed from,) the amount of such costs and damages was referred, at the instance of the proctor of the seizer, to the registrar and merchants, who, after repeated meetings on such

reference, whereat the proctor of the seisor attended and was heard in objection to the amount claimed on account of such costs and damages, made, on the 5th of June, 1846, a report, wherein they reduced such amount from the sum of 8,799*l.* 17*s.* 11*d.*, the original claim made in respect thereof, to the sum of 2,318*l.* 15*s.*, which sum only they considered should be allowed, instead of that claimed; and which report was afterwards, on the 2d of July, 1846, confirmed by the court, without objection on the part of the proctor for the seisor. Wherefore he prayed the judicial committee to pronounce for the protest in this case, and relax the inhibition issued and served in virtue of the appeal as aforesaid, and that otherwise right and justice in the premises might be done to him.

To this protest, her Majesty's procurator-general replied, and after admitting the facts as stated in the protest, alleged, that although under the circumstances thereinbefore stated, it was the duty of the proctor engaged, by and on behalf of our sovereign lady the Queen, to have immediately asserted an appeal from the decree, yet by way

of explanation of his having omitted so to do, he stated and [* 110] submitted the circumstances *deposed to, and detailed in the affidavits, setting forth in detail the facts constituting the merits of the case, that there were only five proctors practising in such Vice-Admiralty Court, two of whom were merchants; one a pensioned military officer of the East India Company's service; one a pensioned market-master of the East India Company's late establishment at the island of St. Helena; and the other an assistant in a mercantile house; and that none of the five proctors had any legal education, and that there has not been any precedent of an appeal from that court. That the judge of the court is the only lawyer on the island; and there was no person conversant with the law and mode of proceeding with whom the aforesaid proctor could advise on the subject of an appeal; and that he acted through ignorance in not doing so. Wherefore, he prayed their lordships to overrule the protest of the respondent, and to assign him to appear absolutely.

July 4, 1849.¹ To this reply, such parts as sought to put in issue the merits of the case, the respondent's proctor objected to, and on the 4th of July, 1848, such objection was argued before their lordships, when the reply was directed to be reformed by striking out the part objected to.

¹ Present: Lord Langdale, Lord Campbell, Sir Herbert Jenner Fust, and the Right Honorable T. Pemberton Leigh.

To the reply thus reformed the respondent rejoined, and alleged, that of the five proctors, or persons acting as proctors, in the Vice-Admiralty Court at St. Helena, at the time of the sentence being given, in the case of the schooner *Aquila*, in that court, one of them was, and had been for many years before, the coroner of that island; two others then were, and had been for *some [*111] time before, practising as attorneys in the Supreme Court of the island; and a fourth, the proctor of Layton, then was, and had been for many years before, an assistant to, and partly conductor of the business of the sole or only notary-public in the island. And he further alleged, that the rules and regulations touching and concerning the practice to be observed in suits and proceedings, in the several courts of vice-admiralty established in her Majesty's possessions abroad, and in appeals therefrom, were and must be well known to all proctors, or persons practising as proctors, in the Vice-Admiralty Court at St. Helena, inasmuch as a printed copy thereof, accessible to, and constantly referred to by all such proctors, or persons acting as proctors, in the said court, is always kept in the registry of such court; another printed copy thereof (belonging to the judge of the court) being also usually kept in the said court, or in the judge's chamber adjoining thereto; and whose clerk is ready to lend, and, on their application, frequently did lend, such copy to such or any of such proctors of the court, or persons acting as such, as chose to apply for the same. And he moreover alleged, that the suit in the Vice-Admiralty Court at St. Helena, touching or concerning the schooner *Aquila*, was conducted (in common with all suits in that court) in conformity to the rules and regulations; and that the judge of the court, in the course of giving sentence in the suit, or at the conclusion thereof, intimated to, or reminded the proctor of Layton, that if dissatisfied with such sentence, it was open to him to appeal therefrom, wherein the time prescribed by the regulations, and which the proctor of the said Henry Layton, at one time, said that it was *his intention to do. And he lastly alleged, [*112] that on the 19th day of August, 1846, Layton, being then at St. Helena, himself ordered his proctor to pay, and who, accordingly, paid¹ to the proctor of the master and claimant, in the Court of Vice-Admiralty at St. Helena, of the schooner *Aquila*, a certain supplementary bill of costs of his, incurred in the cause relative thereto, then lately depending in the court.

The facts thus alleged were verified by affidavit.

¹ June 22, 1849.

The various proofs alluded to having been brought in, the cause came on to be heard before the judicial committee, on the protest against the appeal.

The *Queen's Advocate*, (Sir John Dodson,) and the *Attorney-General*, (Sir John Jervis,) for the crown, submitted, that from the circumstances disclosed in the affidavits there had been no neglect in prosecuting the appeal.

Dr. Addams, in support of the protest. The rules and regulations touching the practice of appeals, to be observed in suits and proceedings in the vice-admiralty courts established in her Majesty's possessions abroad, have not been complied with in this appeal. [Lord Langdale. Have these rules any more force than as rules of court? If there had been a right of appeal from the interlocutory decree, it is perempted by the reference to the registrar and merchants to take accounts.] Yes, that would be a desertion of the appeal, and the right of appeal would be wholly perempted by the acts done by the seizer in furtherance of the interlocutory decree or sentence.

[* 113] The fact of the crown being interested can make no difference. In *Laing v. Ingham*,¹ this court held, that the crown was perempted from appealing, as an appeal had not been interposed within the time required by the Mauritius charter of justice, and that the crown had no greater right than a subject, in such circumstances, to be let in to appeal.

THE RIGHT HONORABLE DR. LUSHINGTON. The facts of this case lie in a small compass. A Brazilian vessel was captured on the 11th of November, 1845, by one of her Majesty's sloops, *The Cygnet*, as liable to forfeiture, for having been equipped for, and engaged in, the slave-trade. The vessel was proceeded against in the Vice-Admiralty Court of St. Helena, to which port, as the nearest, she had been taken. On the 19th of March, 1846, the judge and commissary of that court, having heard the proofs, and the proctors on both sides, admitted the claim of the master for the vessel and cargo, and decreed the same to be restored to the claimant, and condemned the seizer in costs and damages, and the usual reference was directed to the registrar and merchants to ascertain and report the amount of such costs and damages. Various meetings were held before the registrar and merchants for this purpose, at which the proctor for the seizer attended

¹ 3 Moore's P. C. Cases, 26.

and took an active part, and succeeded in reducing the amount originally claimed from 8,799*l.* 17*s.* 11*d.*, to 2,318*l.* 15*s.*, being one third of the original claim, which reduced sum was reported to be due from the seisor, and that report was duly confirmed on the 2d of July, 1846. Now, from the decree pronounced on the 19th of March, 1846, up *to the 4th of December, 1846, no appeal was [*114] interposed or asserted, and the fifteen days limited by the 35th of the rules established under the 2d & 3d Will. IV. c. 51, for regulating the practice of Vice-Admiralty Courts for interposing an appeal, have expired long since, even if the right had not been altogether waived, by the seisor's conduct in attending and taking the active part he appears to have done, in the reference to the registrar and merchants. In these circumstances the case stood, when, in December, 1846, her Majesty's proctor presents a petition for leave to appeal. That petition having been referred to this committee, and a motion made by the Queen's Advocate to admit the appeal, their lordships directed the matter to stand over, with liberty to the Queen's proctor to verify the facts stated in his petition, and show merits, if there were any, for being let in to appeal. Two affidavits having been filed, this court was again moved on the 19th of February, 1847, when leave was given to the seisor's proctor to bring in his appeal, subject to the same being dismissed on a counter-petition being presented by the respondent. The appeal having been brought in pursuant to this leave, no counter-petition to dismiss, was presented; but the proctor, on behalf of the master of vessel and cargo, brought in an act on protest against the admission of the appeal, stating circumstances why he should not be compelled to appear, and alleging, that the appeal was not duly prosecuted according to the rules of the Vice-Admiralty Court within fifteen days, and that any right which the appellant might have had, was effectually perempted by the course adopted by the appellant in submitting to, attending, and taking an active part upon the reference made to the registrar and

*merchants. Now, with the merits of the case, their lord- [*115] ships, in this stage of the proceedings, have nothing whatever to do; it is admitted on all hands that this is an application to the indulgence of the court, and the question their lordships have to decide is, whether they have the power to dispense with the rule limiting the period for appealing to fifteen days, and if so, whether there is such a case shown, as entitles the crown to this indulgence. The ground insisted on, is, the ignorance of the proctor for the seisor in St. Helena; but their lordships remark, that all the proceedings taken by him are strictly regular, and according to the rules of practice in all Vice-Admiralty Courts, and they cannot think that upon

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the single point, namely, the right of appeal, he was alone ignorant. It is in evidence that the book of rules and regulations made under the act, is in the court at St. Helena, and was accessible to the seizer's proctor, and surely if he could conduct the case as he has done there, with strict regularity in the proceedings, even if he did not know that he was at liberty to appeal, he ought to have ascertained the fact by referring to the rules and regulations; instead of which, he not only neglects to assert an appeal in due time, but actually assents to the decree, and acts under it, by attending and taking part before the registrar. Under such circumstances, their lordships think there is no case which entitles the seizer or the crown to any special indulgence, and without giving any opinion upon the merits, their lordships are of opinion that no sufficient grounds have been stated to enable them to allow the appeal, and they, therefore, pronounce for the protest, and dismiss the respondent from all further process.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

[* 334]

* THE ENDEAVOR.

Nathaniel Colby and others, *Appellants*; William Watson and another, *Respondents*.¹

February 28, 1848.

Upon a tender for salvage services, in getting a vessel off the Newcombe Sand, it appeared that, in order to get the vessel off the Sand, both her bower anchors and chains were slipped, and that the salvors, after getting her off, called in the aid of another boat to recover the anchors. *Held*, that the general salvage was completed when the vessel was off the Sand, and that the getting up of the anchors formed no ingredient in the salvage services as to entitle those who recovered the anchors to share in the general salvage of the ship and cargo.

Where the salvors took no step in the Admiralty Court to issue a commission of appraisement of the vessel proceeded against, this court, as the court of final appeal, will not admit affidavits appraising the vessel.

THIS was an appeal from a decree of the High Court of Admi-

¹ Present: Lord Langdale, Lord Campbell, the Right Hon. Sir Herbert Jenner Fust, and the Right Honorable T. Pemberton Leigh.

The Endeavor. 6 Moore's P. C. Rep.

ralty, in a cause of salvage, in which that court pronounced that a tender of 100*l.*, made on * behalf of the owners of the [* 335] ship Endeavor and her cargo, to the respective owners and boatmen belonging to the yawls Welcome Home and Happy Return, was a sufficient remuneration for the services rendered by them, in rescuing her off the Newcombe Sand. The cause was brought under the following circumstances :—

On the 29th of January, 1846, The Endeavor, on a voyage from Hartlepool to London, with a cargo of coals, was run into and damaged in her rigging by a brig in Corton Roads, and soon after, missing stays, she grounded on the Newcombe Sand, off the coast of Suffolk, about four o'clock, P. M., an hour after low water. The weather was fine, the wind very light. All sail was immediately hove back, with a view of backing her off, but without effect, and the small bower anchor, weighing nine cwt., was let go, and twenty fathoms chain veered away. About five o'clock a fishing-smack came alongside and offered assistance, which the master declined. The Welcome Home, with eighteen men, and a galley, afterwards came alongside, and the master of The Endeavor inquired the charge of running an anchor away. The crew of The Welcome Home refused to make any specific charge, and the master engaged their services. The Welcome Home ran away. The Endeavor's best bower anchor, weighing ten cwt., and fifty fathoms of chain; and her small bower being slipped, she was, at high water, hove off to the best bower; her kedge, with two warps, was run away to the eastward, and she was hove further off the ground, slipped from her best bower and chain, and brought up by her kedge, until The Endeavor's anchors and cables were recovered, and, at about half past ten, she * was brought up in Corton Roads. [* 336] In recovering the anchors and chains, the other yawl, The Happy Return, with eighteen men, was employed, at the instance of the crew of The Welcome Home. The whole number of men engaged in actual salvage service was twenty-nine. The value of the ship, cargo, and freight, was sworn at 1,834*l.* The owners of The Endeavor tendered 100*l.*, which the salvors rejected, when an action was entered by them at 400*l.*

The salvors relied upon the number of hands employed, contending that it was owing to that circumstance alone that the vessel was got off that tide. The owners of The Endeavor, on the contrary, insisted that such numerical force was wholly unnecessary, and altogether unauthorized by the master, who only engaged the crew of The Welcome Home to carry out an anchor and heave at the windlass; and that this yawl's crew could have recovered both anchors

and chains, as they were engaged to do; and that if an unlimited number of persons were permitted, by the original salvors, to assist in doing that for which the latter were solely engaged, and quite competent to perform, the owners were not legally rendered liable to remunerate such persons as salvors.

The learned judge of the Admiralty Court, (the Right Hon. Dr. Lushington,) by his sentence, held the tender to be sufficient; that, when the vessel got off the Sand, there was an end of the salvage service; that The Happy Return was not a salvor; and that, if she was entitled to be paid at all, it was simply for work and labor done in getting up the anchors; and condemned the salvors in 15*l.*, *nomine expensarum*.

[* 337] * From this sentence the salvors appealed, and, by their reasons of appeal, submitted that the sentence ought to be reversed:—

Because it appeared, from the proofs in the cause, that The Endeavor and her cargo were rescued from a state of peril at sea by the united exertions of twenty-nine men; and

Because the vessel, having lost both her bower anchors and cables, and being merely held by her kedge anchor, was not in a state of security; and, consequently, that the weighing of the two bower anchors and cables formed a most important ingredient in the salvage services.

The respondents, on the other hand, contended that the sentence appealed from was proper, for the following reasons:—

1st. Because the only salvage services received by The Endeavor were, in fact, performed by one boat's crew, the eighteen men of The Welcome Home, and were terminated by The Endeavor being hove off the Sand, without any difficulty, danger, or extraordinary exertion, by about two hours' labor, and during fine weather.

2d. Because the boat's crew of The Welcome Home were alone engaged by the master to perform the whole necessary service, including the picking up and putting on board both the anchors and chains, which they might easily have done, and that no necessity existed for sending on shore for and employment of The Happy Return; and such additional men and such employment, not having been ordered or authorized by the master, the appellants were not liable to remunerate those men as salvors.

[* 338] * 3d. Because the getting The Endeavor off the Sand, and recovering her anchors and chains, under the circumstances, were such ordinary and slight salvage services, and required for their performance so small an amount of skill, labor, or time, (by whatever number of men performed,) as to be amply compensated by the 100*l.*, especially considering the value of her cargo.

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At the opening of the appeal, the counsel for the appellants applied to be admitted to bring in affidavits of the actual value of the ship, upon the ground that the salvors' agent, in the court below, believing that the owners would give a fair value, did not think it necessary to extract a commission of appraisement, but that it had been discovered that the vessel and cargo was of greater value; that the court below awarded 100*l.* upon an estimated value of 1,834*l.* They cited, in support of the application, *The Oscar*.¹

SIR HERBERT JENNER FUST. We cannot entertain this application. The appellants ought to have applied to the court below, and have made it a part of the appeal, whereas no step has been taken in this matter, and you now ask a court of final appeal to receive further evidence. The appellants have let the proper time go by, and this court cannot help them.

Mr. Sergeant Shee and Dr. Robinson, for the appellants. The court below has allowed nothing for recovering the anchors, but we submit that the recovering * the anchors, in such [* 339] circumstances, was a salvage service. They were lost in the course of the salvage service, and *The Endeavor* could not go away without them. The salvage was not complete until the anchors were safely on board.

[LORD LANGDALE. Do you contend that, after the ship was salvaged, there was another salvage service for recovering her anchors?]

The Wreck and Salvage Act, 9 & 10 Vict. c. 99, s. 19, recognizes as salvage service the recovery of an anchor.

[LORD LANGDALE. The anchors were not derelict; it was known where they were.]

It is a question of principle whether, when an anchor is lost in the course of a salvage service rendered to the ship, and the recovery of the anchor is necessary, in order to place her in a place of safety, it is not a salvage service, and entitled to reward. *The Westminster*² shows the modes of estimating the salvage. Independently of salvaging the anchors, the value of the service was not sufficiently considered. Only 100*l.* is given out of 1,800*l.*, to twenty-nine men.

1 2 Hagg. Adm. R. 257.

2 1 W. Rob. jun. 229.

The Endeavor. 6 Moore's P. C. Rép.

The *Queen's Advocate*, (Sir John Dodson,) and *Dr. Harding*,¹ for the respondents, were not called upon to address their lordships.

SIR HERBERT JENNER FUST. Their lordships entirely agree in the opinion of the learned judge of the Court of Admiralty. The facts of the case lie in a very narrow compass. The *Endeavor*, bound to London, from Hartlepool, with a cargo of coals, about half past three o'clock on the afternoon of the 29th of January, got [*340] on the Newcombe *Sand, off the coast of Suffolk, and remained there for some time, the master having, at first, refused to accept the assistance offered him; thinking his own crew would be sufficient to get the ship off the Sand. The services of the salvors were accepted, and twenty-nine men were engaged, as stated by the salvors, from half past five, and by the owners, from eight o'clock, until about ten or eleven at night. Therefore these twenty-nine men, in two vessels, were employed this time in doing what was necessary for the purpose of getting this vessel off the Sand; the whole salvage service was completed. Two anchors were afterwards recovered, and it is contended that this was part of the salvage service; and the question is, whether the persons employed in getting up the anchors are entitled to be considered as general salvors.

The first question is, where was the necessity for employing them at all? Were not the crew of *The Welcome Home* sufficient for the purpose? It is not stated, in any one of the affidavits, that they were not sufficient to recover the anchors, with the aid of the crew of *The Endeavor*.

Their lordships are of opinion that the general salvage of the ship and cargo was completed when the vessel was got off the Sand, and that the getting up of the anchors ought not to be considered as part of the salvage service. The learned judge of the court below was of opinion, taking the value of the property at 1,834*l.*, that the tender of 100*l.* was sufficient. He did not adjudicate this to be the proper sum, but he adjudicated that it was amply sufficient, and that the salvors were not entitled to more. Their lordships, considering that

they are not bound to look to the services of *The Happy* [*341] *Return*, unless *they were necessary for salving the ship and cargo, are of opinion that this sum was properly pronounced to be sufficient, and will recommend her Majesty to pronounce against the appeal, and affirm the sentence, with costs.

The Christina. 6 Moore's P. C. Rep.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

* THE CHRISTINA.

[* 371]

Thomas Petley and others, *Appellants*; and William Catto and others, *Respondents*.¹

July 4 and 5, 1848.

A steam-tug entered into a verbal agreement with the master of a vessel, having a licensed pilot on board, to tow her to London; in coming up the river they came across a brig, near a tier of vessels; the pilot hailed the tug to go to the westward of the brig, but the master of the tug disobeyed the order, and went to the eastward, and thereby caused a collision between the vessels. The tug afterwards completed the towage, and brought the vessel to her destination. *Held*, in such circumstances, that the disobedience of the orders of the pilot was not justifiable, and that the towage was forfeited.

Quære, Whether, notwithstanding such misconduct, the tug could recover towage from the owners of the vessel, under the contract, and leave the vessel towed to a cross-action for the damage.

This question not having been properly raised or discussed in the Admiralty Court, the Judicial Committee, sitting as a Court of Appeal, refused to entertain it.

THIS was a cause, civil and maritime, brought by the appellants, the owners of the steam-tug *Lass o' Gowrie*, against the bark *Christina*, to recover the sum of 8*l.*, for towage services rendered by the tug to *The Christina*.

* The facts, as alleged in the act on petition, were shortly [* 372] these:—That about one o'clock, P. M., on the 31st of August, 1847, the tug being in the lower part of Sea Reach, in the river Thames, following her avocation of towing vessels, spoke the bark *Christina*, a vessel of 250 tons, homeward bound, to London; that a verbal agreement was made by the masters of the bark and tug, that the latter should tow the former up to London for the sum of 8*l.*; that a rope from the bark was thereupon made fast to the tug, which then proceeded towards London, with the bark in tow, and, on passing Gravesend, a duly licensed Trinity House pilot was taken on board the bark, to navigate her to London; that, about six o'clock, P. M., in consequence of the tide failing, the bark was brought to anchor off Woolwich, by direction of the pilot, and on

¹ Present: Lord Langdale, Lord Campbell, Sir Herbert Jenner Fust, and the Right Hon. T. Pemberton Leigh.

The Christina. 6 Moore's P. C. Rep.

the flowing of the tide, at three o'clock, A. M., of the following day, the bark was again got under weigh, in charge of the pilot, and having been again made fast to the steam-tug, the latter towed her to the entrance of the Surrey Canal Dock, whither the bark was bound when the tug left her; that application had been made to the master and owners of The Christina, for the payment of the towage money, but without their being able to obtain it.

The answer of the owners of The Christina admitted that their vessel spoke the tug Lass O'Gowrie, and engaged her to [*373] tow the bark in a careful and *skilful manner into dock, which she undertook to do, for the sum usually paid for

towage by vessels of such burden and description as the Christina; that on the arrival of the bark, in tow of the steamer, off Gravesend, the sea pilot left her, and a duly licensed Gravesend pilot was taken on board, who, about seven, P. M., brought her to anchor off Woolwich; that, on the following morning, the wind being W. N. W., with light breezes and cloudy weather, the bark weighed anchor, in the tow of the steam-tug, and proceeded up the river; that about four, A. M., when in Limehouse Reach, the crew of the bark being on the look-out, the pilot on the starboard side, the master on the larboard side of the bark's poop, and the mate on the larboard side of the forecastle, saw a vessel ahead with her sails set, but apparently having her anchor down, (which proved to be the brig Mary Clark, at such time drudging by her anchor into a tier in Limehouse Reach); that the pilot, seeing there was not sufficient room for the bark to go to the eastward of the brig, in consequence of the tier of vessels there stationed, immediately and loudly called out, several times, to the master of the tug to tow to the westward, (Limehouse Reach being situate about S. S. W. and N. N. E.,) thereby meaning to tow the bark to port, and, at the same time, gave orders to starboard the helm of the bark, and immediately afterwards to port the helm hard a-starboard, both of which orders were promptly obeyed; that the master of the tug, instead of obeying the orders of the pilot, and taking a course to the westward of the brig, continued to pursue a course to the eastward, which was improper, by reason that there was no room on that side of the brig; that the pilot, seeing the error of the tug, called out, "Where are you going with the ship?"

[*374] Why *don't you tow to the westward?" and directed the mate of the bark to stand by the anchor; that the master of the tug, however, still took no notice of the repeated orders of the pilot, but persisted in attempting to pass to the eastward of the brig, when, all at once, the helm of the tug was put a-starboard, and she came right on the larboard bow of the bark, whereupon the pilot

called to the master to "go on," and repeated such order, but when the bark was within a cable's length of the brig, the tow-rope was cast off by the tug, which left the bark, in her then perilous situation, to be drifted by the flood-tide, then running strong; that the pilot immediately ordered the mate of the bark to let go her anchor, which was instantly done, but too late to avoid collision with the brig, whereby both vessels sustained considerable injury; that, had the master of the steam-tug attended to the orders of the pilot, or towed the bark in her proper course to the westward of the brig, or not cast off the tow-rope, no accident would have occurred; that the collision was not in the least degree attributable to the pilot or crew of the bark, but was occasioned solely and entirely in consequence of the carelessness, want of skill, mismanagement, or inattention to the orders of the pilot, by those on board the tug, by reason whereof the owners of the bark refused and declined to pay the 8*l.* claimed; that the owners of the bark had incurred a heavy expense in repairing the brig, as well as their own vessel.

The owners of the tug, in reply, denied that the tug had been under any special engagement to tow the bark in a careful and skilful manner; and denied that The Mary Clark, when in Limehouse Reach, was drudging by her anchor into a tier, for that she was *riding at her anchor, and at least one hundred yards [*375] below the tier; and denied that there was not sufficient room for the bark to go to the eastward of the brig, which was the proper course, and the tug could have safely towed her to the eastward, but the pilot called out to the tug to tow the bark to the westward, whereupon the tug's helm was immediately put hard a-starboard for that purpose, and the tug herself went westward, clear of the brig, but which the master of the tug saw the bark could not do, owing to the flood-tide running very strong, and so, of necessity, he cast off the bark, when about ten fathoms from the brig, loudly hailing the bark to go to the eastward, which might have been safely done by putting the bark's helm a-port, whereas it was kept so long a-starboard that she came in contact with the brig. And they further alleged, that the pilot in charge of the bark infringed a regulation of the Trinity Board, by getting the bark under weigh in Woolwich Reach, and proceeding up with her in the dark, the collision having occurred full an hour before daylight.

On the hearing of the cause, on the 13th January, 1848,¹ the learned judge of the Court of Admiralty (the Right Hon. Dr. Lush-

¹ Case reported, *nom.* The Christina, 3 W. Rob. Adm. R. 27.

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ington) was of opinion that, although the pilot might not have exercised a sound discretion in the orders he gave, yet that it was satisfactorily established that there was no justification for the steam-tug refusing to obey and carry into effect these orders; and that being the case, that the master did not fulfil the contract on which he was suing, and that, as he did not fulfil the contract, he was not entitled to recover; and, upon these grounds, pronounced against the claim, with costs.

[* 376] * From this judgment and decree the present appeal was brought by the appellants, the owners of the steam-tug, and now came on for hearing.

Sir Frederick Thesiger, Q. C., and *Dr. Addams*, for the appellants. It is of great importance to ascertain whether it is to be a rule that, in all cases such as the present, the towage is to be forfeited. Surely, even assuming there was some negligence on the part of the tug, that will not justify the owners of *The Christina* refusing to pay towage under the contract. The contract was to tow the bark to London, and, that service having been performed, the claim for the sum stipulated undoubtedly attached. If there was any negligence on the part of the towing vessel from which damage arose, that would be a ground for a counter-claim, by a cross-action. This is the principle at common law. Thus, in *Farnsworth v. Garrard*,¹ it was laid down by Lord Ellenborough that, "if there has been no beneficial service, then there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence." And this decision has been adopted and acted upon in *Denew v. Daverell*,² and *Duncan v. Blundell*.³ In the present case no specific damage is alleged, and it was incumbent upon the owners to show that the damage suffered by *The Christina* was greater than the sum claimed. But if negligence on the part of the tug would afford an answer to the claim, the question will then be, [* 377] whether the proper *course was to the eastward or westward of *The Mary Clark*. The master of the tug, when he was ordered to go to the westward, was proceeding to do so, but seeing that the bark could not go to the westward, he cast off the tow-rope, and *The Christina* might easily have gone to the eastward by porting her helm, whereas she dropped her anchor and occasioned the damage. Although, *prima facie*, the master of a steam-tug is

¹ 1 Camp. 38.

² 3 Camp. 451.

³ 3 Stark. 6.

The Christina. 6 Moore's P. C. Rep.

bound to obey the orders of a pilot on board the vessel towed, there are cases in which it is his duty to disobey them, and this was a case in which he was justified in the course he pursued. Here the pilot could not see what the master of the tug did, namely, that the bark could not go to the westward of the brig. If this judgment stands, there will be two suits against the steam-tug for collision with The Christina and The Mary Clark. The pilot was alone to blame, for he, contrary to the Trinity House regulations, weighed before daylight, and the collision occurred before daylight. Even if negligence might bar the claim of the tug, it was necessary for the owners of The Christina to establish that fact, and that there was none on her part. If that point be doubtful, as the *onus probandi* is upon them, their case fails. Assuming that the tug was in error in casting off the tow-rope, it was the duty of The Christina to do all in her power to avoid the collision, whereas, instead of porting her helm, she dropped anchor and actually occasioned the collision.

The *Queen's Advocate*, (Sir John Dodson,) and *Mr. Martin, Q. C.*, for the respondents. The appellants' arguments raise two points; one of law, and one of fact. The point of law is, whether a steam-tug, hired to tow a vessel, no matter how *gross her [*378] negligence, is still entitled to towage. [Lord Campbell. Was this question raised in the Admiralty Court?] No. [Lord Campbell. Then it ought not to be made in the Court of Appeal. It is not the function of a court of the last resort to decide points not raised in the court below.] This argument is a plea in bar raised here for the first time. The cases cited by the appellants, however, would not be binding upon the Admiralty Court, which is invested with an equitable jurisdiction. The true question is, what was the contract or agreement? The appellants assume that it was properly fulfilled; but it was not an agreement merely to tow the vessel up to the Surry Dock, at their discretion, and as they saw fit; it was an essential part of the contract, that they should tow her in obedience to the directions of the pilot on board The Christina. The general rule is admitted, that the steam-tug is bound to obey the orders of the pilot on board the vessel towed; but the appellants say, that this is an exception to the rule. It is clear, however, that they did not fulfil this contract. First, they did not promptly obey the orders of the pilot to go westward of The Mary Clark; and, secondly, when they did obey the order they did not persevere; even when they cast off the tow-rope, they might have towed the bark to the westward. The argument of the appellants that there was a right course and a wrong course is fallacious; the tug had only to obey the orders of

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the pilot. We were not to blame for dropping our anchor, as this was done in hope of stopping the vessel, but the tide drove her.

[*379] * LORD LANGDALE. This is a suit for the recovery of the sum of 8*l.*, for towage service rendered by a steam-tug named *The Lass o'Gowrie*, to the bark *Christina*.

This is the first case in which the court has had a discussion upon a point of law of considerable importance, namely, whether, admitting that there had been misconduct on the part of the master of the steam-tug, the owner could still proceed for the recovery of the towage, under the contract. In considering the judgment of the court below, we are of opinion, that that question was not properly raised, and not discussed in that court; so as to make it proper for us to decide it, or to entitle the party to put the point to us here, sitting as a Court of Appeal. And, therefore, upon this ground, we are of opinion, that we must lay that question out of our consideration; we express no opinion upon that part of the case, until the question is brought before us in a proper manner.

Now, it is said, that there was no misconduct on the part of the steam-tug; that it did the towage, and fully performed what it engaged to perform, and, consequently, that the owners are entitled to recover the sum due for that service. Upon this there is a considerable conflict of evidence. The facts appear to be these: The steam-tug was taking the bark up the river, and had come to Limehouse Reach, a part of the river in which was a vessel, called *The Mary Clark*, near a tier of ships. It appears that the *Mary Clark* was so situated that a passage might have been had by the eastward or the westward of her. The master of the tug was proceed-

[*380] ing to the eastward; *the pilot on board the bark thought fit to order him to go to the westward. It was some time after

the order was given before it was obeyed; and it is a matter of contest between the parties, whether the order was heard by the steam-tug before the time when it was ultimately obeyed. There seems very strong reason to think, that the order must have been heard before it was obeyed, because it was heard before that time by a witness who was placed at a greater distance than the tug from the bark, and who heard the call. The master of the steam-tug says, that as soon as he heard the order it was instantly obeyed; that he passed to the westward, but as it was impossible for the bark to go to the westward, he cast off the tow-rope, and that he acted as far as he could in obedience to the orders he had received. Imperfect obedience is disobedience, and the question is, whether such disobedience was justifiable under the circumstances. It has been argued as a

The Illeanon Pirates. 6 Moore's P. C. Rep.

justifying circumstance, that if he had not cast off the tow-rope The Christina would have been dragged by The Mary Clark; and that is a circumstance respecting which there is also conflicting evidence. It is stated that there was sufficient room for the bark to have passed to the westward even after the time when the tug ceased to tow; and that if she had continued to tow to the westward, no collision would have happened.

Now, we have carefully considered the evidence, and our opinion is in concurrence with the judgment of the court below: we think that the learned judge of that court has come to a correct conclusion, and we ought not to differ from him and reverse his judgment, unless we could clearly come to a contrary * conclusion. [* 381] This being the case, we must affirm the judgment and with costs. In coming to this conclusion, we cannot help expressing our regret that, as this was a mere question of fact, the owners of the steam-tug should have put themselves to so much more expense by this appeal than their claim amounts to.

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ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

* THE ILLEANON PIRATES.

[* 471]

The Queen, in her Office of Admiralty, and William Townsend, Esq., her Majesty's Procurator-General in her Office of Admiralty, *Appellants*; and Sir Edward Belcher, K. C. B., and others, *Respondents*.¹

June 25, 1849.

Bounties awarded under the statute 6 Geo. IV. c. 49, to the commander, officers, and crew of her Majesty's ship Samarang, upon the capture and destruction of piratical prahns, in the Straits of Gillolo, in respect of the piratical crew on board the prahns.

Leave to appeal against an interlocutory decree of the Admiralty Court, awarding such bounties, granted to the Admiralty Proctor, on behalf of the crown, notwithstanding an appeal had not been interposed within due time, the circumstances of the case entitling the appellants to such indulgence.

THIS was an appeal from an interlocutory decree, of the High

¹ Present: Lord Brougham, Lord Langdale, the Right Hon. Sir Herbert Jenner Fust, and the Right Hon. T. Pemberton Leigh.

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Court of Admiralty, in a cause promoted under the act [*472] 6 Geo. IV. c. 49,¹ on the part of * Sir Edward Belcher, K. C. B., the commander, and the rest of the officers and crew of her Majesty's ship Samarang, respecting the capture or destruction, on the 3d and 4th of June, 1844, in the Straits of Gillolo, of certain prahns or vessels, manned by pirates or persons engaged in acts of piracy.

The petition set forth that, on the 3d of June, 1844, her Majesty's ship Samarang, being then engaged in surveying duties, and near the island of Gillolo, Sir Edward Belcher, her captain, with two officers and four men, quitted her in the gig, accompanied by the second barge, armed with a brass six-pounder gun and small arms, and manned with twenty officers and men, for the purpose of taking astronomical observations and fixing points of land; and the party in the gig having landed on the extreme edge of a reef extending from a small islet, were engaged in such duty, the barge, in the mean time, lying off, when, about half-past twelve o'clock, P. M., they were disturbed by an extraordinary yell, proceeding from about forty men of color, who were advancing from the islet, [*473] * along both sides of the reef, with the evident intention of surrounding Sir Edward Belcher and his party, on nearing whom they commenced hurling spears and arrows, though without effect; that the men were all naked, except their chiefs, (who wore scarlet,) and were soon repulsed and put to flight by musketry; that in the mean time a prahn, with about fifteen men of color, pulled round a point from the islet, and advanced on the barge with an apparent hostile intention, but, perceiving the brass gun in her bows,

¹ The statute 6 Geo. IV. c. 49, under which these proceedings were founded, is entitled "An Act for encouraging the capture and destruction of Piratical Ships or Vessels." Section 1 provides "that there shall be paid to the officers, seamen, and others who shall have been actually on board of any of his Majesty's ships or vessels of war, or vessels at the actual taking, sinking, burning, or otherwise destroying of any ship, vessel, or boat, manned by pirates, or persons engaged in acts of piracy, the sum of 20*l*. for each and every such piratical person, either taken and secured, or killed during the attack on such piratical vessel; and the sum of 5*l*. for each and every other man of the crew not taken or killed, who shall have been alive on board such pirate vessel at the beginning of the attack thereof, the number of such piratical men respectively to be proved by the ship's papers, taken on board such piratical ship, vessel, or boat, verified by the oaths of two or more of the persons who shall have found and taken possession of such papers, or by such other evidence as, under the circumstances of the case, shall, by the judge of the High Court of Admiralty, or by the judge of any other court, authorized to take cognizance of such matter, be deemed sufficient proof thereof."

sheered off, much disconcerted, and although desired to depart, and warned by several shots fired over her, she described a wide course, and then joining the land assailants, retreated to the islet; that about three o'clock, P. M., his observations being finished, Sir Edward Belcher embarked in the barge, and accompanied by the gig, under the command of Mr. Hooper, proceeded in the direction taken by the prahn, towards the rear of the islet, when the same and another prahn, filled with natives, were observed escaping from two villages, whence the first assailants had issued, and many natives were also seen escaping from such villages into the jungle; that the villages, and some boats, and six war prahns, lying on the beach, were thereupon burnt by Mr. Hooper and the gig's crew, whilst Sir Edward Belcher, in the barge, pursued the flying prahns, captured one of them, which ran into a creek, and was abandoned by her crew as the barge approached, and afterwards, on coming up with the other, which proved to be the first-mentioned prahn, by a discharge of round and canister shot compelled her crew to desert her, and both the prahns were then towed out to sea and burnt; that, the gig having rejoined the barge, both boats *pro- [*474] ceeded, during the night, twenty miles to the southward, and anchored in a lonely bay within thirty yards of the beach, where, about two o'clock, A. M., of the 4th of June, they were aroused by the sound of gongs, and at the same time saw five large prahns advancing rapidly towards them, the leading prahn being highly decorated, and bearing such streamers and banners as are borne only by the Illeanon pirates, the most noted pirates in those seas; that the boats were immediately cleared for action, and the leading prahn being allowed to pass outside of them, her chief, who was on the roof, with his fighting men, and wore scarlet, addressed the people in the boats, asking, "Who are you?" And Sir Edward Belcher having replied in English, as well as in the Malay language, "The captain of a British ship of war," a voice from the prahn, in broken English, asked, "Where is your ship?" to which Sir Edward Belcher replied, "Outside;" whereupon the chief and people in the prahn commenced yelling and capering, and casting their spears and arrows into the boats, and, at the same time, endeavored to get the head of their prahn towards the boats; that an action immediately commenced with four of the prahns, wherein twelve rounds of well directed round and canister shot from the six-pounder gun, divided successively between them, within twenty yards' distance, caused the splinters to fly very profusely, and completely cleared their roofs, when the surviving pirates, panic-struck, grounded their prahns and fled to the shore, when musketry was directed against the fugitives,

then so close, that the spears of those on the beach passed over the boats, and rendered the situation of those on board them [*475] highly dangerous, and, whilst the boats were engaged in conflict with the fourth prahn, the other pirates were enabled to carry off their killed and wounded into the jungle; that the three largest prahns were then captured, dragged off the reef, and towed out into deep water, and left in charge of Mr. Hooper, in the gig, but, in the mean time, the fourth prahn was recovered and retained by the pirates, who in her rejoined the fifth prahn, which had kept aloof during the action; that Sir Edward Belcher, in the barge, immediately went in pursuit of them; after a chase of two miles, and a sharp conflict, with repeated discharges of musketry on both sides, they were abandoned by the survivors of their crews, who escaped to the shore, and the two prahns were thereupon captured by Sir Edward Belcher and his people, who found many dead and dying persons therein, and were then towed out and burnt; that at this time, six o'clock, A. M., five prahns of the largest size were observed drawn up in order of battle, and so as to oppose the return of the barge towards the gig, and on the barge approaching them, the pirates on board the prahns commenced yelling and dancing, with a brisk accompaniment of small guns and musketry. Such attack, however, was not returned until the barge reached within twenty yards of the prahns, when, by discharges of round and canister shot from the six-pounder gun, divided alternately amongst them, together with Congreve rockets and musketry, great slaughter and confusion was caused, and those of the pirates who were not killed or severely wounded jumped overboard, and fled to the jungle for shelter, but, before such event, a ball from the leading prahn struck Sir Edward Belcher on the thigh, and knocked him overboard, severely and dangerously wounding him; that Sir Edward [*476] * Belcher having been lifted out of the water and dragged into the barge, was shortly afterwards enabled to resume the command, when seeing five fresh prahns advancing, and having no ammunition left for resistance, and therefore finding it impossible to take possession of or destroy the five prahns whence their crews had just been driven, the barge at once proceeded to The Samarang, which it reached about ten o'clock, A. M., and from which ship Sir Edward Belcher immediately despatched the barge and two cutters, under the command of Lieutenant Heard, to go in search of the gig, and then follow the remaining prahns; that, in the mean time, Mr. Hooper, who had been left in command of the gig, finding the barge did not return, proceeded, about seven o'clock, to examine the three captured prahns under his charge, which he found to be armed with

guns, and to have on board flags and banners similar to those used by the Illeanon pirates; that in one of the prahns he found a dead body, and in another a woman and child, prisoners of the pirates; and Mr. Hooper having landed the woman and child, destroyed the prahns, and, in the course of the forenoon, having joined the barge and two cutters from The Samarang, he then returned to that ship, between ten and twelve miles distant, to recruit and obtain a fresh crew; that the barge and cutters having thus parted from the gig, proceeded to the scene of the morning's action, wherein some of their party had been engaged, and there found the five prahns from which the pirates had been driven, as aforesaid, hauled up a creek, and lying there with seven others of a similar size, with many pirates on board; that on approaching those prahns, which, however, they could not do * within four hundred yards, on [* 477] account of the shallowness of the water, a fire was opened and kept up against The Samarang's boats from a masked battery, notwithstanding which an incessant fire from three brass guns, namely, the six-pounder in the barge and two three-pounders in the cutters, and discharges of Congreve rockets, were kept up against the twelve prahns at the aforesaid distance, and, in consequence thereof, they were destroyed, or rendered perfectly useless and many men on board them killed or wounded; that the boats then proceeded to another creek, where they found and destroyed two small prahns, but with no one on board, and afterwards returned to The Samarang; that the crews of the two prahns, which were chased and destroyed on the 3d of June, amounted at least to fifteen men in each prahn; that the crews of the five prahns attacked and destroyed in the action, which commenced about two o'clock, A. M., of the 4th day of the same month, amounted at least to eighty men in each of the three prahns, and to fifty-five men in each of the other two prahns; that the crews of the five prahns attacked and destroyed in the subsequent action, which commenced about six o'clock, A. M., amounted at least to ninety men in each prahn, making a total of not less than eight hundred and thirty men, who were alive and on board twelve piratical prahns at the beginning of the respective attacks thereof; that none of such piratical persons were taken or secured, but that three hundred, at least, of the piratical persons were killed during such attacks; that there were not less than five hundred piratical persons alive on board the twelve other prahns at the beginning of the attack thereof, which prahns were attacked and destroyed in the afternoon of the 4th of June; that none of such * piratical persons were taken or secured, but that fifty [* 478] of them, at least, were killed during the attack; and, in

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conformity with the 6 Geo. IV. c. 49, the petitioners prayed that the court would accept the affidavits of Captain Sir Edward Belcher, of Lieutenant Thomas Heard, of Mr. Henry Singleton Hooper, and of Mr. Arthur Adams, as evidence of the facts therein detailed; and to pronounce that there were one thousand three hundred and thirty piratical persons alive on board the several prahns at the beginning of the attacks thereof respectively; by the officers and crew of her Majesty's ship Samarang, and that three hundred and fifty at least of such piratical persons were killed during such attack.

The petition having been lodged in the registry, with affidavits in support thereof, notice was given, by the petitioners' proctor, to F. H. Dyke, Esq., her Majesty's proctor and procurator-general, of the petitioners' intention to move the court to pronounce in the terms, and according to the prayer of the petition.

No notice of the motion, upon this petition, was given to the proctor for the Lords Commissioners of the Admiralty, by whom the orders for payment of bounties, by the accountant-general of the navy, are required to be made out and given;¹ but the

[*479] motion * having been postponed, at the instance of her

Majesty's proctor, was afterwards brought on, her Majesty's advocate-general being instructed by her Majesty's proctor to oppose the same, and appearing in opposition thereto.

The motion was supported by affidavits of Sir Edward Belcher, the commander, Henry Singleton Hooper, the purser, Arthur Adams, assistant-surgeon on board The Samarang. These affidavits set forth in detail the four actions. Lieutenant Heard and Mr. Adams, who had been in the actions of the morning of the 4th of June, deposed that they found the five prahns which they had engaged with in the morning drawn up in the creek, with seven others; that the number of men alive and on board the prahns, at the beginning of the three first attacks, were eight hundred and thirty, and the number killed, including those on board the five prahns not taken or destroyed in the third action, was three hundred. The number stated to have

¹ By the 2 Will. IV. c. 40, entitled "An Act to amend the Laws relating to the Business of the Civil Departments of the Navy, and to make other Regulations for more effectually carrying on the duties of the said Departments," the authorities, powers, and duties, vested in the commissioners of the navy (with certain exceptions) not applying to this case, were transferred to the commissioners for executing the office of Lord High Admiral, and all bills theretofore made out, or drawn upon, and accepted by the commissioners or treasurer of the navy, were, by the said act, directed to be made out, or drawn upon, and accepted, by the accountant-general of the navy.

been alive and on board the twelve prahns, at the beginning of the attack on them in the last engagement, was five hundred, and the number killed fifty.

The judge of the Admiralty Court, (the Right Hon. Dr. Lushington,) by an interlocutory decree, dated the 26th of May, 1847, pronounced that certain prahns or vessels, names unknown, were, on or about the 3d and 4th of June, 1844, taken and burnt, or otherwise destroyed, by the boats belonging to her Majesty's ship *Samarang*, the said Sir Edward Belcher, K. C. B., commander, in the Straits of Gillolo; that, at the time of being so taken and burnt or otherwise destroyed, the prahns or vessels, names unknown, were manned and navigated by pirates, or persons engaged in acts of piracy; and that there were alive and on board the prahns or vessels, at the commencement * of the engagement in which the same [*480] were taken and burnt or otherwise destroyed, as aforesaid, one thousand three hundred and thirty pirates, or persons engaged in acts of piracy, of whom three hundred and fifty were killed, and nine hundred and eighty effected their escape.

In pursuance of this decree, the agent of Sir Edward Belcher and the officers and crew of *The Samarang*, in the month of June, 1847, made application to the Lords Commissioners of the Admiralty for payment of the sums of 7,000*l.*, being 20*l.* per head for three hundred and fifty pirates killed in the attack, and 4,900*l.*, being 5*l.* per head for nine hundred and eighty who made their escape. The Lords of the Admiralty, on being apprised of this decree, were dissatisfied with the sufficiency of the proofs upon which it was founded, and, after a correspondence with the treasury, on the 8th of December, 1847, instructed the Proctor for the Admiralty to appeal to the Judicial Committee of the Privy Council; but, on the petition of appeal being presented, the registrar refused to receive it, on the ground that the appeal had not been interposed in due time.

16th December, 1847.¹ The *Admiralty Proctor* moved for leave to file the petition and appeal, notwithstanding an appeal had not been made within the ordinary time.

The *Queen's Advocate*, (Sir John Dodson,) and the *Admiralty Advocate*, (Dr. J. Phillimore,) in support of the motion. The proceedings in the court below were irregular. * No notice [*481]

¹ Present: Lord Brougham, Lord Langdale, Lord Campbell, and the Right Hon. T. Pemberton Leigh.

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was given to the Lords of the Admiralty of the motion to the judge of the Admiralty Court, for the bounties claimed under the statute 6 Geo. IV. c. 49, which ought to have been done, as the Lords of the Admiralty alone are authorized under the act, 2 Will. IV. c. 40, to pay the money. They were, therefore, necessary parties to such an application.

[LORD CAMPBELL. The question is, whether the Queen, in her Office of Admiralty, was represented by the Queen's Advocate and Proctor. There was no opportunity for the Lords of the Admiralty to appeal.]

The offices of Procurator to her Majesty, in her Office of Admiralty, and Procurator-General, are distinct. It may be a question whether the Lords of the Admiralty, not being before the court below, have a *personâ standi* in a Court of Appeal. The registrar refused to receive the appeal, because it was not made within fifteen days after sentence, as required by the practice of the court; but by the statute 33 Geo. III. c. 38, s. 1, power is given, in prize causes, to permit appeals to be prosecuted after the ordinary time for them has elapsed. Our present application is *ex debito justitiæ*.

[LORD BROUGHAM. Your application goes to this extent. You say, first, that for want of notice there is an irregularity; but, even if regular, you then ask for the indulgence of the court. If you have not been heard, it is a question whether the case ought not to be sent back to the court below.]

We ask for liberty to appeal here.

Dr. Addams, for the respondents, opposed the motion, and submitted that no notice was ever given, in such cases, to the [* 482] Lords of the Admiralty, and cited, upon that point, The *Serhassin*,¹ and upon the time and manner of appealing statutes, 24 Hen. VIII. c. 12, s. 7, and 25 Hen. VIII. c. 19.

LORD BROUGHAM. There are two grounds urged before us for granting leave to appeal in this case. First, the alleged irregularity of the proceedings in the court below, the Lords of the Admiralty having no notice given them of the intended motion; and, secondly,

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supposing there had been no irregularity, yet, by mistake or accident, the appeal was not presented in time, and you apply now to the large discretion of the court to let you in. Now, we exclude all question of irregularity, and, looking at the merits, think it right to allow the appeal; we have no doubt that due consideration will be given in the proper quarter to the question of costs, as, were this an ordinary case, no leave would be granted but upon the terms of the payment of costs.

The appeal now came on for hearing.

The *Queen's Advocate*, (Sir John Dodson,) the *Admiralty Advocate*, (Dr. Phillimore,) and *Mr. Godson, Q. C.*, appeared for the Queen, in her Office of Admiralty. The real question is, whether the prahns were engaged at all in piratical adventures. The piratical character of the vessels attacked and destroyed is not, we submit, established by the affidavits; but even if it should be deemed that such piratical character is sufficiently established, then, we submit, that no *bounties were due, in respect of the five prahns deserted [*483] by their crews, but not captured or destroyed in the third engagement. There is no sufficient proof that these five prahns formed part of the twelve attacked in the fourth action, nor that any of the twelve prahns were burnt, sunk, or otherwise destroyed; but if they were, there is no proof that, at the commencement of this last engagement, there was any person on board of any such vessels during the attack. The statute 6 Geo. IV. c. 49, enacts, that the number of such pirates is to be proved by the ship's papers taken on board such piratical ship, or, failing that proof, by "such other evidence" as shall, by the judge of the High Court of Admiralty, be deemed sufficient proof thereof. Here there is no satisfactory proof given of the character or number of the men on board the prahns.

Dr. Addams and *Dr. Harding*, for the respondents, were not called upon to address their lordships.

THE RIGHT HON. SIR HERBERT JENNER FUST. Their lordships entertain no doubt of the fact, that the persons attacked were pirates, or engaged in acts of piracy. The manner in which they attacked The Samarang's boats sufficiently showed this. The question, then, is, the number of the prahns destroyed. The evidence describing the four actions leaves no doubt as to the destruction of the prahns, and that the five prahns which made their escape in the third engagement formed part of the twelve destroyed in the fourth engagement,

[*484] in the afternoon of the 4th of *June. We are of opinion that the facts have been ascertained, as far as they can be under the circumstances. Then, as to the number of persons engaged on board the prahns, there being no ship's papers, we must resort to other evidence to establish that fact. The affidavits, we think, are sufficient to show that the number of persons on board the prahns have been truly stated in the petition, and this number is not disputed by the appellants. Upon the whole of the case, and considering the gallantry of the actions, their lordships are unwilling to disturb the finding of the court below. We shall, therefore, advise her Majesty to affirm the decree, as to the character of the vessels, and the number of the pirates killed and destroyed, and to remit the cause, with costs.

CASES

SELECTED FROM VOLUME VII.

OF

MOORE'S PRIVY COUNCIL REPORTS.

[THE CASES SELECTED ARE THOSE IN ADMIRALTY.]

1849-50.

CASES
HEARD AND DETERMINED BY THE
JUDICIAL COMMITTEE
AND THE
LORDS OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

*THE CHRISTIANA.¹

[*160]

Edmund Hammond and others, *Appellants*, and John Rogers and
John Rodd, *Respondents*.²

February 18 and 19, 1850.

The duties of the master and crew of a vessel, with a licensed pilot on board, defined and pointed out.

The *onus probandi* lies on the owner of a ship, claiming exemption from liability for damages, under the Pilot Act, Geo. IV. c. 125, s. 55, by reason of having a licensed pilot on board, to prove that the damage was occasioned by the fault of the pilot.

The 6th Geo. IV. c. 125, only relieves owners of vessels from liability for damages done by their ship, where the damage is occasioned by the fault, negligence, or misconduct of the pilot alone.

A ship, having a licensed pilot on board, whilst at anchor in the Downs, the weather being bad, was run into by another vessel, and made to start from her anchorage, and was driven into a vessel at anchor. Held, that she was to blame, and liable for damages, because, 1st. The ship, notwithstanding the bad weather, and a large number of vessels lying wind-bound in the Downs, had neglected to send down her top-gallant and main-royal yards, and also her short fore and mizen-top-gallant masts; and, 2d. That she did not set her stay-sail and jib, and so drag her anchor off shore.

¹ 7 Notes of Cases, p. 2.

² Present: Lord Langdale, Lord Campbell, Mr. Baron Parke, and the Right Honorable T. Pemberton Leigh.

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In such circumstances, held, (affirming the decree of the Admiralty Court,) that the neglect to set the stay-sail and jib after she was driven from her anchorage, was the fault of the pilot alone; but that the neglect in not sending down the top-gallant masts, &c., the cause of damage, was the joint fault of the pilot and master, and that the owners were not exonerated by the Pilot Act, 6 Geo. IV. c. 125, s. 55.

When the vessel came to anchor in the Downs, the duty of the pilot ended, but as he did not quit the ship, she continued under his charge.

THIS was a cause of damage, civil and maritime instituted in the High Court of Admiralty by the respondents, the owners of the bark Marshal Bennett, of 360 tons, against the American ship, [*161] The * Christiana, of 762 tons, to recover the loss sustained in a collision between the two vessels in the Downs.

The act on petition alleged, that the bark Marshal Bennett, bound from London to Constantinople, with a general cargo, on the 1st of December, 1848, came to anchor in the Downs, the wind blowing strong, with hard squalls from the west; that on the morning of the 4th, the wind blowing a strong gale from the W. S. W., and S. S. W., the best bower cable was veered out to the end, when about five A. M. the man on the look-out descried the ship Christiana right ahead, not more than three ships' lengths, driving fast into the hawse of the bark, the night being dark and the ship showing no light, whereas the bark had a bright light in her cuddy; that the ship drove so fast that it was impossible for the bark's chain to be slipped in time to avoid her, and very soon after she struck The Marshal Bennett, and caused her considerable damage; and it alleged, that the collision was entirely owing to the carelessness or want of skill of those on board The Christiana, who, notwithstanding the bad state of the weather, and the large number of vessels (above

[*162] one hundred) lying wind-bound *in the Downs, and, also, notwithstanding she had been driving the greater part of the night, neglected to send down The Christiana's top-gallant and main-royal yards, but kept the same across, as also her short fore and mizen-top-gallant masts; although the same or similar precautions were adopted by The Marshal Bennett, and other vessels in the Downs, whereby they were enabled to ride out the bad weather in safety, some of them with only one anchor down; and that had The Christiana adopted such precautions, she would, in all probability, have rode out the weather, and the collision been avoided; that even after The Christiana was found to be driving from her anchors, no measures were taken on board of her, by exhibiting a light, or otherwise, to give timely warning to other vessels, in consequence of which neglect, prior to her collision with the bark, she had come in collision with another vessel called The Rouennais, and that, had her stay-sail and jibs been set, she would have dragged her

anchor off shore and cleared The Marshal Bennett, or, to avoid the collision, she might have slipped from her anchor and gone out to sea.

The answer of the owners of The Christiana alleged, that on the night of the 3d of December, the wind blowing strongly from the W. S. W., she was brought up by her small bower anchor, and seventy-five fathoms of chain, under the directions of a licensed Trinity pilot, there being about one hundred and fifty vessels lying in the Downs, wind-bound; that early in the morning of the 4th, it being dark, the wind having veered to S. S. W., a heavy squall came on, during which a strange bark drove down, stern foremost, upon The Christiana, and occasioned her to start her anchorage;

*that the ship's best bower anchor was then let go, under [*163] the pilot's order, and the best bower chain veered out to sixty fathoms, the ship continuing to drive, when, all at once, the bark was seen right astern, whereupon the pilot, considering that veering out of more chain would be dangerous, from the close proximity of the two vessels, ordered the veering to be stopped, and that the fore top-mast stay-sail should be set, the fore yards filled, and the helm put hard a-starboard, (which was instantly done,) in order, if possible, to sheer the ship clear of the bark, which was hailed to slack away or slip their chain; that the bark's crew paid no attention to their hailing, nor made any attempt to avoid a collision, and the ship drove down upon the bark; that at this time, only one of the bark's crew appeared on deck, and her chain was foul; that the entire management of The Christiana throughout the premises was in the hands of the pilot only, and that all his orders were instantly and implicitly obeyed. The answer denied that there was any occasion for her to have sent down her top-gallant and main-royal yards, and her short fore and mizen-top-gallant masts, or either, at the period of her being brought up, or that her not having sent them down occasioned the collision, which was solely occasioned by the strange bark being driven into her; it further alleged, that The Christiana had a large and brilliant lamp burning in the after-cabin, the light from which could be seen a great way off through the large windows in her stern, and there was a large bright binnacle-lamp on the higher part of her poop, visible for three miles; it denied, that she had been in collision on the night aforesaid, save as aforesaid; and the answer alleged, that the collision in *question, if not [*164] the result of accident, was imputable to the negligence or unseamanlike conduct of those on board the bark Marshal Bennett, and was in no degree imputable to The Christiana, or to any one on board The Christiana, but if to any one, it was imputable to the

The *Christiana*. 7 Moore's P. C. Rep.

pilot then in charge of the ship, and all whose orders and directions had been obeyed in the management thereof, and by reason thereof they submitted, that under the provisions of the act of parliament, the owners of *The Christiana* were not chargeable with the damage accruing to the Marshal Bennett.

Witnesses were examined on both sides, the effect of whose testimony is stated in the judgment.

The judge of the Admiralty Court, (the Right Honorable Dr. Lushington,) who was assisted by two of the elder brethren of the Trinity House, was of opinion, that *The Christiana* was to blame, and pronounced for the damages against *The Christiana*; first, because that vessel had neglected to send down her top-gallant and main-royal yards, also her short fore and mizen-top-gallant masts; and, secondly, because she did not set her stay-sail and jib, and so dragging her anchor off shore; that, though the latter was the fault of the pilot alone, the first was a neglect, not only of the pilot, but of the master, and, consequently, the owners, according to the rule laid down in the case of *The Diana*,¹ were not protected by the statute, there being joint negligence on the part of the master and the pilot.

From this decree the present appeal was brought, and now came on for argument.

[*165] *The *Attorney-General*, (Sir John Jervis,) and *Dr. Addams*, for the appellants. The judgment of the court below proceeds upon an erroneous basis. It has nothing to do with the true question to be tried, whether *The Christiana* had neglected to send down her top-gallant and main-royal yards, also her short fore and mizen-top-gallant masts, or not, when she was started from her anchorage; since the pilot on board has deposed, that there was no occasion to send them down, and that it did not occasion the collision. The cause of the collision was *The Christiana* being driven from her moorings, and assuming that, when so driven, she was rendered less capable of control in consequence of her yards and masts not having been sent down, was she, therefore, to be responsible for the damage? The collision occurred from an inevitable accident. *The Itinerant*.² There might be gross negligence in not sending down the yards and masts, yet, if the injury did not arise directly therefrom, it is too remote, and *The Christiana* cannot be made liable for it. *Lynch v. Nurdin*.³ Assuming, however, that it was otherwise, the bringing up of the vessel, the manner in which she should

¹ 4 Moore's P. C. Cases, 11.

² 2 W. Rob 236.

³ 1 Q. B. Rep. 29.

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be anchored was the duty of the pilot. The Gipsy King.¹ The keeping up or sending down the yards and masts were exclusively the duties, and within the province of the licensed pilot in charge, whose functions, when the vessel drifted, redevolved upon him. If the fault, then, was his, the owners are not accountable for his fault, or incapacity. Abbott "On Shipping," pp. 182, 345;² they are entitled to the protection of the statute, 6 Geo. IV. c. 125, s. 55, and exonerated from liability. *The Atlas;³ Lucey v. In- [*166] gram.⁴

[LORD CAMPBELL. Suppose the pilot has a fit, or is drunk?]

In the first case there would be no pilot; in the second, he could be lawfully superseded. The case of The Duke of Manchester⁵ is an authority, that if the orders of the pilot are wrong, the master should not follow them. In a case of obvious danger the master is bound to interfere in the management of the vessel, although a licensed pilot be on board. The Girolamo.⁶ A pilot is *pro hac vice* the commander of the vessel, and has absolute control, unless incompetent or disabled. There cannot be joint neglect when there was not coequal authority, unless, as in the case of The Diana,⁷ where the master and crew neglected their duty, a distinction existing between acts of omission and commission. The Marshal Bennett herself was *in delicto*, for her anchor was not in a proper condition.

Sir Frederick Thesiger, Q. C., and Dr. Bayford, for the respondents. This case comes within, and must be governed by, the principles laid down in The Diana. That was a case of joint negligence of the master and crew and the pilot, and it was held, that the statute 6th Geo. IV. c. 125, s. 55, did not exempt the owners of a vessel, having a licensed pilot on board, from liability for damages done by their vessel, unless the damage was solely caused by neglect, default, incompetency, or incapacity of the pilot. Here the negligence of the master of The Christiana, in not sending down the yards and the masts was the real cause of collision. The Christiana dragging her anchor was caused by *her not adopting the [*167] precaution taken by other vessels, of sending down her yards and masts. This is not the duty of the pilot.

¹ 2 W. Rob. 537.

² 6th edit., by Shee.

³ 2 W. Rob. 502

⁴ 6 Mee. & Wels. 302.

⁵ 2 W. Rob. 470; S. C. 6 Moore's P. C. Cases, 90.

⁶ 3 Hagg. Adm. Rep. 169.

⁷ 4 Moore's P. C. Cases, 11.

[MR. BARON PARKE. If the dragging of her anchor was the cause of damage, whose fault was it that the main-royal yards and masts were not taken down? You say that the master and pilot were both to blame. If they were not, and it was the dragging of her anchor that caused the injury, whose business was it to see to that and prevent it? Who is responsible for the neglect? In the case of *The Diana*, both master and pilot were to blame.]

It was the duty of the master. The pilot's duty was, in fact, at an end the moment the vessel was brought to anchorage at the Downs.

[MR. BARON PARKE. In *Falconer's Marine Dict.* tit. "Pilot," it is said, that after a pilot is taken on board the master is no longer answerable.]

A vessel at anchor is under the sole control of the master.

The *Attorney-General*, in reply. The vessel being wind-bound in the Downs, and the pilot not having quitted her, the duty of the pilot had not terminated, as he was in charge of the vessel, and, consequently, exonerated the owners. The Pilot Act, 6th Geo. IV. c. 125, s. 55.

July 4, 1850. MR. BARON PARKE. This case, which came before their lordships on an appeal from the Admiralty Court, is of importance, inasmuch as it involves the consideration of the respective duties and liabilities of the pilot, the master, and crew, when the vessel is under the care of a pilot. It is a cause of damage civil and maritime, prosecuted by the owners of *The Marshal Bennett* against the American ship *Christiana*.

[*168] *The charges of negligence against those on board *The Christiana*, appear, from the act on petition, to have been four: First, that, notwithstanding the bad state of the weather the large number of vessels (about one hundred) lying wind-bound in the Downs, and also, notwithstanding *The Christiana* had been driving about the greater part of the night, those on board her neglected to send down the top-gallant and main-royal yards, and also her short fore and mizen-top-gallant masts, though the same or similar precautions were adopted by *The Marshal Bennett* and other vessels in the Downs, whereby they were enabled to ride out the bad weather in safety, some of them with only one anchor down; and that had *The Christiana* adopted the same precautions, she would, in all proba-

The Christiana. 7 Moore's P. C. Rep.

bility have ridden out the weather, and the collision would not have taken place. Secondly, that after The Christiana was driving, those on board did not take proper precautions, by exhibiting a light or otherwise, to give timely warning to other vessels. It was also stated that, besides the collision complained of, she fell foul of the French ship Rouennais before the Marshal Bennett. Thirdly, that, after leaving The Rouennais, those on board The Christiana might have cleared The Marshal Bennett, if they had set their stay-sail and jib, and so might have dragged their anchor off shore. Fourthly, that they might also have slipped their anchors, and gone out to sea, and so have avoided the collision.

The answer on behalf of The Christiana was, First, that she was under the care and management, at the time of collision, and before, of a duly licensed Trinity pilot, whose orders were implicitly obeyed. Secondly, that the collision was caused, not by the ship driving by the mere force of the wind, but in *consequence [* 169] of a strange bark driving her from her moorings about half past two, A. M., during a heavy squall, and that every precaution was afterwards taken to prevent her coming in contact with other vessels. Thirdly, that a light was duly exhibited on board The Christiana. Fourthly, that they did set their stay-sail and jib at the proper time to avoid the collision, and that there was no occasion to send down the top-gallant mast and main-royal yards, and her short fore and mizen-top-gallant masts. And, lastly, that the damage might have been prevented if the crew of The Marshal Bennett had kept a good look-out, and had slipped her cable; but that it was foul, and, consequently, that step was not taken, and, therefore, though the crew of The Christiana might be in fault, the owners were not responsible.

The disputed questions of facts were disposed of, and, we think, satisfactorily, by the learned judge below, with the assistance of the Trinity Masters. The neglect to exhibit a light, or give timely warning, by The Christiana, after she broke from her moorings, was also disproved. We think, also, that the fact was, that The Christiana was driven from anchorage, not by the force of the wind, but by collision with another vessel. Whether she afterwards ran into a French vessel (The Rouennais) or not, does not appear to us to be material. Nor do we see any reason to disagree with the conclusion of the Trinity Masters, that The Christiana was in fault in not setting the stay-sail and jib, and so dragging the anchor from the shore, after she was driven from her anchorage, and that she was justified in not slipping from her anchor, and going to sea. We are satisfied with their opinion, that The Marshal Bennett was not

[*170] guilty of any neglect whereby the collision could * have been avoided. We also think it clear that, though The Christiana came to anchor the night before, and the pilot might have left her, yet that, as he did not, she continued under the charge of the pilot. And we think, also, that they came to a right conclusion, that, considering the state of the weather, and the position the vessel was in, with a large number of vessels lying wind-bound in the immediate neighborhood, it was a neglect not to send down the top-gallant and main-royal yards, not even after she began to drift,—a fact admitted on both sides; and that, if this had been done, either when the vessel anchored, or after she drove, the collision might have been avoided, and that this neglect was the cause of it.

The disputed facts being thus disposed of, the question is, whether, upon these facts, the owners of The Christiana are responsible or not?

This is a very important question, and it depends upon the extent of exemption which the ship-owner is entitled to, when his vessel is in charge of a pilot. The exemption depends upon the statute 6th Geo. IV. c. 125, s. 55, which enacts that no owner or master shall be answerable for the damage which shall happen from or by reason or means of the neglect, default, incompetence, or incapacity of any licensed pilot duly acting in charge of the vessel under the provisions of this statute.

It was held, at first, in putting a construction upon this statute, that if a pilot was on board, and there was a neglect in the navigation of the vessel, it was *primâ facie* attributable to him, and that he, and not the owner, was responsible, unless it was shown that his orders were disobeyed. This is laid down in *Bennet v. Moita*,

7 Taunt. 258. Subsequently a different, and, we think, a [*171] more correct, view of this *subject was taken by Dr. Lushington, the judge of the Admiralty Court, in the case of *The Protector*, 1 Rob. Jr. 45, when, on a full consideration of the question, it was held, that the master and owners were *primâ facie* liable, and that the *onus probandi* was thrown on them to show that the neglect was that of the pilot. In order, then, to free the owners in this case from responsibility, it was their duty to show, that the neglect to send down the top-gallant yards, masts, &c., was the neglect of the pilot. Further, it was held in the case of *The Diana*, 1 Rob. Jr. 181, affirmed on appeal by this court, (4 Moore's P. C. Cases, 11,) that the owners were responsible, unless the neglect which caused the damage was solely that of the pilot. If it was the fault of both the pilot and the master or crew, the owners are still responsible. The question then is, whether the omission which is decided to have been the

The *Christiana*. 7 Moore's P. C. Rep.

cause of collision in this case, has been shown by the appellants to be that of the pilot only.

The duties of the master and the pilot are in many respects clearly defined. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiencies of the ship and her equipments, the competency of the master and crew, and their obedience to the orders of the pilot in every thing that concerns his duty; and, under ordinary circumstances, we think that his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only.

The expressions attributed to the learned judge, in the report of his judgment in this case, we are perfectly satisfied, was never intended to suggest that, *under ordinary circum- [* 172] stances, the master was to exercise any discretion whether he would obey the pilot or not. There may be extraordinary occasions when the master would be justified in disobeying the commands of the pilot. If, from sudden illness or intoxication, he becomes incompetent to command, the supreme authority would revert to the master during the period of the pilot's temporary incapacity. It may be the same in the case of manifest incapacity of a permanent character; but any opinion upon these questions is unnecessary for the decision of the present case, as none of these circumstances occurred. The pilot has, unquestionably, the sole direction of the vessel in those respects where his local knowledge is presumably required; the direction, the course, the manœuvres of the vessel, when sailing, belong to him; and the Trinity Masters, therefore, rightly decided, that the neglect to set the stay-sail and jib, after *The Christiana* was driven from her anchorage, was the fault of the pilot alone. It was, also, his sole duty to select the proper anchorage-place and mode of anchoring, and preparing for anchoring, as was held to be clear in the case of *The Gypsy King*, 2 W. Rob. 537.

Whose neglect, then, was it, that the top-gallant yards, masts, &c., the cause of damage, were not sent down. The Trinity Masters considered that it was the fault, not of the pilot exclusively, but of both the pilot and the master; that the former, when he brought the vessel to anchor, ought to have seen that the top-gallant yards, &c., were sent down, as a part of the proceeding of anchoring; and after the vessel drifted, he ought to have done so, as a part of his duty in navigating the ship; but that the master was bound, in the ordinary course of navigation, and independently *of local [* 173] knowledge, to do the same thing, in the first instance, in such an anchoring ground, and under such circumstances as *The*

Christiana was placed in. This, we have good reason to believe, was the ground on which their opinion was founded; had this been a local usage, depending on local circumstances, we should have thought that it was the exclusive duty of the pilot to have taken care that that usage was complied with; but the step being one which every master, according to the ordinary course of navigation, ought to have taken in every open roadstead where many vessels were lying, and in blowing weather, that duty was not exclusively the pilot's, but that of the master also; and if the pilot had given express orders to the master not to send down the top-masts, &c., we do not say that the owners might not have been excused from responsibility for the consequences of that omission.

We certainly are not bound, any more than the learned judge of the Admiralty Court was, by the opinion of the Trinity Masters, but we, of course, give great weight to their nautical experience, and we do not see any ground for being dissatisfied with the opinion that they formed. We think, that the fault, in this case, was one for which the pilot was not exclusively responsible, and, therefore, that we ought to advise her Majesty to affirm the judgment of the Admiralty Court.

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2. The 5th Geo. IV. c. 113, s. 29, enacts that no appeals shall be prosecuted, from any sentence of any Court of Admiralty or Vice-Admiralty, (with the exception of the Cape of Good Hope and eastward thereof,) unless an inhibition be applied for and decreed within twelve months from the time of the decree or sentence being pronounced. By the 3d & 4th Will. IV. c. 41, the appellate jurisdiction given by the previous statute to the High Court of Admiralty was vested in the Judicial Committee of the Privy Council; but which court, from its constitution, had no jurisdiction over the appeal until the petition of appeal was referred to them by the crown. The appellant presented, on the 16th of July, 1841, a petition of appeal from a decree of condemnation, pronounced on the 12th of August, 1840, by the Vice-Admiralty Court of Sierra Leone, against a vessel engaged in the slave-trade, contrary to the provisions of the 6th Geo. IV. c. 113. The appeal was not referred by her Majesty to the Judicial Committee until the 11th of August, 1841, one day before the year expired, and notice of such reference was not given by the clerk in council until the 13th of the same month, one day after the twelve months had expired, when the appellant applied for and obtained an inhibition. On protest against the appeal, <i>Held</i> — 1st. That the 5th Geo. IV. c. 113, was incorporated in the 3d & 4th Will. IV. c. 41; 2d. That the appellant having failed to procure, in		

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compliance with the 29th section of the 5th Geo. IV. c. 113, an inhibition to issue within twelve months from the sentence, was barred his appeal; the provisions of that section being imperative, and leaving no discretion in the court to relax the operation of the act IV. M. 284

3. The 5th Geo. IV. c. 113, (the Slave Abolition Act,) s. 29, enacts that no appeals shall be prosecuted from any sentence of any Court of Admiralty or Vice-Admiralty, (except in any Vice-Admiralty Court at the Cape of Good Hope, or to the eastward thereof,) unless an inhibition be applied for and decreed within twelve months from the time of the decree or sentence being pronounced. *Held* to apply to foreigners as well as British subjects. Protest against an appeal sustained. The appellants, (Brazilian subjects,) the owners of the cargo on board a vessel seized and condemned under the 5th Geo. IV. c. 113, having failed to procure an inhibition to issue within twelve months from the date of the condemnation. The British parliament have no power to legislate for foreigners, out of the dominions and beyond the jurisdiction of the crown, yet it can, by statute, fix the time within which application must be made for redress to the tribunals of the empire. This being matter of procedure, becomes the law of the forum, by which all mankind are bound IV. M. 300

4. By the 35th section of the rules respecting appeals from the Vice-Admiralty Courts abroad, made under the authority of the statute 2d & 3d Will. IV. c. 51, all appeals are to be asserted within fifteen days after the date of the decree appealed from. In March, 1846, a decree was pronounced by the Vice-Admiralty Court of St. Helena, restoring a vessel seized by a British cruiser for an alleged infraction of the Slave-Trade Act, and referring the amount of costs and damages to the registrar. No appeal was asserted by the seizer's proctor, who attended before the registrar under the decree. In the month of December of that year, a petition of appeal was brought in by the queen's proctor, on behalf of the seizer, which the registrar (in consequence of the appeal not having been asserted within fifteen days) refused to receive. On an application made *ex parte*, supported by affidavits stating that it was the seizer's proctor's ignorance of the rule for asserting the appeal which alone prevented him from appealing, leave was given to appeal, subject to a counter-petition being presented by the respondent to dismiss the appeal. Upon an act on protest, against the right of appeal by the respondent, *Held*, by the Judicial Committee, that there was no sufficient ground to enable them to allow the appeal VI. M. 102

Attachment.

1. This court will not visit a judge of an inferior court with the penal consequences of an attachment for contumacy and contempt, for disregarding an inhibition, unless such disobedience is wilful, and proceeded from improper motives. An inhibition to the judge of the Vice-Admi-

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- rality Court at Gibraltar, inhibiting him from doing anything prejudicial to the parties appellant, pending an appeal, is not to be disregarded at his discretion, although he may consider that he is acting for the benefit of all parties. Decree for a sale of a vessel condemned, after appeal asserted and inhibition served personally on the judge, held not such a contempt, under the circumstances of the case, as to entitle the owners to an attachment against the judge, for costs and damages incurred thereby IV. M. 273
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B.

- Bottomry.* 1. The party taking a bottomry bond from the master of a vessel, requiring supplies for the further prosecution of her voyage, is bound to ascertain whether such supplies can be procured on the personal credit of the owner, before resort is had to a bottomry bond as security for their amount. *Semble*, where a party has the means of knowing the fact, he is bound to show that he exercised reasonable diligence to ascertain it I. M. 5
2. To justify the resort, by a master of a ship, to a bottomry bond, it is requisite, by maritime law, that the advances should be merely to enable the ship to refit, or to pay for the repair and despatch of the vessel for the completion of her voyage, and that the master should be unable to obtain such advances upon personal credit. The jurisdiction of the Court of Admiralty, in cases of bottomry bond, is founded on the existence of necessity, arising from the want of personal credit. The sale of a bottomry bond, pursuant to public advertisement, by auction, to the lowest bidder, in a foreign port, by the master of a ship, is not sufficient to discharge a purchaser of the bottomry bond from making reasonable inquiries that the master is, under the circumstances, justified in granting the bond. A bottomry bond on the ship, freight, and cargo, sold at public auction, in a foreign port, by the master and part owner of the ship, there being an agent of the charterer and sole owner of the cargo willing to advance, on personal credit of the owner of the cargo, for the necessary repairs of the ship, under the circumstances pronounced against. *Semble*,

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C.

- Collision.* In cases of collision, the rule of the Trinity House, that "where steam-vessels, on different courses, must unavoidably cross so near that, by continuing their respective courses, there would be a risk of coming into collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other," is applicable only when the vessels, by continuing their respective courses, are likely to come into collision, and when, by putting their helms to port, the collision may be avoided; but the rule is not applicable when either vessel, by unskilful management, is so near the shore that, by porting her helm, there would be danger of collision; in such case, the vessel on her right course is justified, in spite of the rule, in putting her helm to starboard IV. M. 314

D.

- Damages.* 1. The 6th Geo. IV. c. 125, s. 55, does not exempt the owners

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- and masters of vessels, having a licensed pilot on board, from liability in respect of damages done by their vessel, unless the damage was solely caused by the neglect, default, incompetency, or incapacity of the pilot. Where, therefore, it was proved that the accident happened through the carelessness of the master and crew, as well as the pilot, in not keeping a good look-out, the Judicial Committee of the Privy Council *Held*, affirming the sentence of the Admiralty Court, that the civil liability of the owner, in respect of damages, continued IV. M. 11
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J.

Jurisdiction. Although in the decision of cases, properly within the jurisdiction of the Court of Admiralty, equitable considerations ought to have weight, yet that court has not jurisdiction to do all that a Court of Equity might do, in suits instituted by persons suing either for themselves, or on behalf of themselves and others, for administration of assets or

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distribution of a common fund. Where, therefore, the owners of a vessel and part of the cargo, lost in a collision, brought an action in the Admiralty Court against the damaging vessel, and obtained a decree for the condemnation of the ship, referring the amount of damages to the registrar and merchants, who were to report them; and, on the same day that the decree was pronounced, the owners of the remaining portion of the cargo brought an action against the damaging vessel, and applied to the court to be let in to participate ratably in the proceeds of the condemned ship, remaining in the registry; it was *Held*—First. That the Admiralty Court, in such circumstances, had no jurisdiction to decree a ratable distribution, and thereby take away the priority of the *prior potens*; and, Secondly. That the decree for damage, and reference to the registrar and merchants, was a definitive sentence. The statute 53 Geo. III. c. 159, was passed for the protection of owners of ships, and applies only to bills in equity, and suits or proceedings instituted by or on behalf of owners, and does not give equitable jurisdiction to the Court of Admiralty in a case where a proceeding is not taken under the statute by the owners of the ship. *Semble*. That the 15th section of statute 53 Geo. III. c. 159, may be applicable to suits for damage in the Admiralty Court, if accompanied by a proceeding on the part of the owners, for their own protection, and may lead to a distribution *pro rata* of the proceeds of the ship among the claimants VI. M. 56

M.

Material Men have no lien for supplies furnished in England, on the proceeds remaining in the registry of the Court of Admiralty, of a ship sold under a decree of that court, for the payment of the seamen's wages. A mortgagee in possession of a ship so sold entitled to the remainder of such proceeds, after payment of seamen's wages and costs III. K. 94

Monition. (See *Slave-Trade*, 3, 4.)

S.

Salvage. 1. In a case of salvage of treasure, by great exertions, from a wreck derelict and sunk under water, one third of the amount saved awarded to the salvors. An admiral, who had taken upon himself personal exertion and responsibility in recovering such treasure, by means of the ships under his command, held entitled to an eighth of the sum awarded for salvage. The admiralty held entitled to repayment, for the pay, victualling, and wear and tear of the king's ships, for the time that they were employed upon a service of salvage of private treasure lost on board of a king's ship, and

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Slave-Trade.

1. In order to render a party liable to the penalties for shipping goods to be employed in the slave-trade, he must be shown to have had a guilty knowledge of the object of the vessel. A person, though convicted of felony under the Slave Abolition Act, 5 Geo. IV. c. 113, s. 10, is capable of prosecuting an appeal against a sentence in the Vice-Admiralty Court for penalties, though his conviction in the Criminal Court was previous to the civil sentence, and he is, at the time of the appeal, undergoing the punishment awarded him by the former. A protest, on the ground of such conviction, overruled . II. M. 1
2. The receiving goods on board a slave-ship is the joint act of the owner and master of the vessel; and the penalties given by 5 Geo. IV. c. 113, s. 7, are, in such case, joint and not several. The owner of a vessel, though a subject of the Queen of Spain and resident at Cadiz, is liable to the forfeitures and penalties incurred under the Slave Abolition Act, if his vessel came within a British port II. M. 15
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given by section forty-six to seizers are not for their benefit, but for their protection against liability to costs and actions, where the judge shall certify, pursuant to 4 Geo. III. c. 15, s. 46, that there was probable cause for seizure. A vessel having been seized in the port of Gibraltar, on the allegation that she was engaged in carrying slaves, or persons to be dealt with as slaves, and, upon proceedings taken against her, held forfeited, and the owners, master, and mate condemned in penalties, the judgment of the Vice-Admiralty Court of Gibraltar was reversed; the Judicial Committee being of opinion that the evidence of the persons, being slaves or intended to be dealt with as slaves, was in itself doubtful, but that neither the owner, master, or mate were proved to be cognizant or privy to that fact, which it was the duty of the seizers to make out. Upon a monition from the Judicial Committee, against the judge and registrar of the Vice-Admiralty Court of Gibraltar, to transmit the proceeds arising from the sale of a vessel decreed to be forfeited, and sold subsequent to an appeal being asserted, and an inhibition issued and served, the whole amount of the proceeds must be brought into court, and not the balance remaining after deducting the costs and fees incident to the seizure and sale. The refusal to comply with such monition is a contempt, and an attachment for such was granted by the Judicial Committee against the judge, registrar, and marshal of the Vice-Admiralty Court

II. M. 19

4. Seizure and condemnation of a Portuguese vessel, under 2 & 3 Vict. c. 73, affirmed on appeal, by the Judicial Committee. Proceedings taken against a vessel seized under the 2 & 3 Vict. c. 73, are to be according to the rules and regulations established under the 2 & 3 Will. IV. c. 51, and not according to the forms of the civil law. The affidavit of a person present at the seizure, though not the seizer himself, is sufficient to ground a monition citing the master in particular, and all others in general, to appear, &c. Evidence of the owners' claim, not tendered in the court below, received by the Judicial Committee, on the hearing of the appeal

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T.

Towage. A steam-tug entered into a verbal agreement with the master of a vessel, having a licensed pilot on board, to tow her to London; in coming up the river they came across a brig, near a tier of vessels; the pilot hailed the tug to go to the westward of the brig, but the master of the tug disobeyed the order, and went to the eastward, and thereby caused a collision between the vessels. The tug afterwards completed the towage, and brought the vessel to her destination. *Held*, in

Towage, Continued.

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such circumstances, that the disobedience of the orders of the pilot was not justifiable, and that the towage was forfeited. *Quære*, whether, notwithstanding such misconduct, the tug could recover towage from the owners of the vessel, under the contract, and leave the vessel towed to a cross-action for the damage. This question not having been properly raised or discussed in the Admiralty Court, the Judicial Committee, sitting as a Court of Appeal, refused to entertain it

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